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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

REARDEN LLC and REARDEN MOVA LLC,  
California limited liability companies,

Plaintiffs,

vs.

WALT DISNEY PICTURES, a California  
corporation,  
Defendant.

Case No. 4:17-cv-04006-JST

**REVISED JOINT [PROPOSED] AND  
DISPUTED JURY INSTRUCTIONS**

Judge: Hon. Jon S. Tigar  
FPTC: November 30, 2023  
Time: 9:00 a.m.  
Ctrm.: 6 (2nd Floor)

Pursuant to the Court’s Order on the Joint Stipulation for Revising Pretrial Filings (Dkt. 568), Case Management Order (Dkt. 313) and Standing Order for Civil Jury Trials, Plaintiffs Rearden LLC and Rearden MOVA LLC (“Plaintiffs”) and Defendant Walt Disney Pictures (“Defendant”) (collectively “Parties”) hereby provide their proposed jury instructions for this matter.

Agreed-upon instructions are designated “UNDISPUTED” in the title, and contain the authority on which they are based. Any deviations from the Ninth Circuit’s Manual of Model Civil Jury Instructions are identified in red-line.

Disputed instructions are designated “DISPUTED” in the title, and are addressed in two sections:

- Section 1 contains the proposed disputed instructions from (A) Plaintiffs and (B) Defendant, in each case identifying the authority on which the instruction is based and red-lines of any deviation from the Ninth Circuit’s Manual of Model Civil Jury Instructions.
- Section 2 contains the Parties’ “concise argument and authority in support of and against use of the instruction” in the form of (A) Plaintiffs’ Position and (B) Defendant’s Position. *See* Standing Order for Civil Jury Trials Before District Judge Jon S. Tigar, at 5.

The Parties reserve the right to amend, modify, withdraw, and/or supplement the following instructions before or during trial of this matter. The Parties further reserve the right to amend, modify, withdraw and/or supplement proposed jury instructions depending upon the Court’s resolution of motions that are still pending (including, as of this submission, Defendant’s pending *Daubert* motion, motion to strike, and motions *in limine*), rulings that have been recently issued (including the Court’s order on Defendant’s motion *in limine* No. 1, Dkt. 584), and other rulings the Court may issue between now and the conclusion of trial.

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1 DATED: November 17, 2023

MUNGER, TOLLES & OLSON LLP

2  
3 By: /s/ Kelly M. Klaus  
4 KELLY M. KLAUS  
5 *Attorneys for Defendant*

6 DATED: November 17, 2023

HAGENS BERMAN SOBOL SHAPIRO LLP

7  
8 By: /s/ Mark S. Carlson  
9 MARK S. CARLSON<sup>1</sup>  
10 *Attorneys for Plaintiffs*

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<sup>1</sup> Signed electronically by Kelly M. Klaus with the concurrence of Mark S. Carlson, pursuant to L.R. 5-1(i)(3).

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I.  
**PRELIMINARY INSTRUCTIONS**

**UNDISPUTED: 1.3 Duty of Jury** ~~**(Court Reads Instructions at the Beginning of Trial but Does Not Provide Written Copies)**~~

Members of the jury: You are now the jury in this case. It is my duty to instruct you on the law.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

At the end of the trial, I will give you final instructions. It is the final instructions that will govern your duties.

Please do not read into these instructions, or anything I may say or do, that I have an opinion regarding the evidence or what your verdict should be.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**DISPUTED: 1.5 Claims and Defenses****1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

The plaintiffs in this case are Rearden LLC and Rearden MOVA LLC. I will refer to them collectively as “plaintiff-asserts” or “Rearden.”

The defendant in this case is Walt Disney Pictures, which I may also refer to as “defendant” or “Disney.” Walt Disney Pictures has stipulated and agreed that ~~[plaintiff's claims]~~ any acts or omissions of any employees of Disney Enterprises, Inc., Disney Studio Production Services Co., LLC f/k/a Walt Disney Pictures Production, LLC or Chip Pictures, Inc. relating to matters in issue in this case are equally attributable to Walt Disney Pictures for purposes of this case.

The plaintiff~~has~~, Rearden, is suing the defendant, Disney, for copyright infringement. As the plaintiff, Rearden bears the burden of proving ~~these~~its claim of copyright infringement by a preponderance of the evidence.

Rearden claims~~;~~ that it owns a copyright in the MOVA Contour software and that non-party Digital Domain 3.0, Inc. (“DD3”) directly infringed Rearden’s copyright by making unauthorized copies of the MOVA Contour software into the random access memory of computers that DD3 operated while working on the 2017 Disney live-action movie *Beauty and the Beast*. Rearden claims that Disney is vicariously liable for DD3’s alleged infringement.

~~The defendant denies those claims [and also contends that [defendant’s counterclaims and/or affirmative defenses]]. [The defendant has the burden of proof on these [counterclaims and/or affirmative defenses.]]~~

~~[The plaintiff denies [defendant’s counterclaims and/or affirmative defenses].]~~

In response, Disney claims that DD3 did not infringe any copyright owned by Rearden when DD3 copied the MOVA Contour software while working on the movie, and that Disney is not in any



1 event vicariously liable for any infringement of the copyright in the MOVA Contour software by  
 2 DD3.

3  
 4 **AUTHORITY:** Ninth Circuit Model Jury Instruction 1.5. Changes to the Model Instruction have  
 5 been made to identify the parties and to state the positions of each party.

6  
 7 **B. DEFENDANT’S PROPOSED INSTRUCTION:**

8 To help you follow the evidence, I will give you a brief summary of the positions of the  
 9 parties:

10 The plaintiffs in this case are Rearden LLC and Rearden MOVA LLC. I will refer to them  
 11 collectively as “plaintiff-asserts” or “Rearden.”

12 The defendant in this case is Walt Disney Pictures, which I may also refer to as “defendant”  
 13 or “Disney.” Walt Disney Pictures has stipulated and agreed that ~~[plaintiff’s claims]~~ any acts or  
 14 omissions of any employees of Disney Enterprises, Inc., Disney Studio Production Services Co.,  
 15 LLC f/k/a Walt Disney Pictures Production, LLC or Chip Pictures, Inc. relating to matters in issue in  
 16 this case are equally attributable to Walt Disney Pictures for purposes of this case.

17 The plaintiff ~~has~~, Rearden, is suing the defendant, Disney, for copyright infringement. As  
 18 the plaintiff, Rearden bears the burden of proving ~~these~~ its claim of copyright infringement by a  
 19 preponderance of the evidence.

20 Rearden claims that it owns a copyright in the MOVA Contour software and that non-party  
 21 Digital Domain 3.0, Inc. (“DD3”) directly infringed Rearden’s copyright by making unauthorized  
 22 copies of code from the MOVA Contour software into the random access memory of computers that  
 23 DD3 operated while working on the 2017 Disney live-action movie *Beauty and the Beast*. Rearden  
 24 claims that Disney is vicariously liable for DD3’s alleged infringement.

25 ~~The defendant denies those claims [and also contends that [defendant’s counterclaims and/or~~  
 26 ~~affirmative defenses]]. [The defendant has the burden of proof on these [counterclaims and/or~~  
 27 ~~affirmative defenses.]]~~

~~[The plaintiff denies [defendant's counterclaims and/or affirmative defenses].]~~

In response, Disney claims that DD3 did not infringe any copyright owned by Rearden when DD3 copied code from MOVA Contour software while working on the movie, and that Disney is not in any event vicariously liable for any infringement of the copyright in the MOVA Contour software by DD3.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

## **2. PARTIES' POSITION STATEMENTS**

### **A. PLAINTIFFS' POSITION**

The parties' dispute over this instruction is limited to a dispute over phrasing in the fifth and sixth paragraphs. Specifically, the differences are as follows, with the disputed language in italics:

- Rearden's proposal (fifth paragraph): ". . . ("DD3") directly infringed Rearden's copyright by making unauthorized *copies of the MOVA Contour software . . .*."
- Disney's proposal (fifth paragraph): ". . . ("DD3") directly infringed Rearden's copyright by making unauthorized *copies of code from the MOVA Contour software . . .*."
- Rearden's proposal (sixth paragraph): ". . . when DD3 *copied the MOVA Contour software . . .*."
- Disney's proposal (sixth paragraph): ". . . when DD3 *copied code from MOVA Contour software . . .*."

The Court should adopt Rearden's version because there is no question that DD3's use of the MOVA contour software resulted in the copying of the entire Contour program into random access memory – this is a point that even Disney's expert agrees with.

Disney's proposed language that DD3 copied "code from" the Contour software misstates the evidence that will be presented to the jury. In fact, the evidence is clear that DD3 was not just copying "code from" the Contour program (which wording suggests something less than the

1 whole); it was copying the entire program, as Disney’s expert Dr. Lane admitted in his deposition  
2 testimony:

3 Q. Okay. So the [] copy of the MOVA Contour software that was loaded into non-volatile  
4 memory, that would have been copied into random access memory, correct?

5 A. By the operating system, yeah.

6 Q. And [] that happened when Digital Domain used the MOVA Contour software; correct?

7 A. In order to activate the program and implement the functionality, it would be copied into  
8 RAM, yes.

9 Lane Dep. Tr. at 13:17-14:1. Plaintiffs’ expert Alberto Menache agrees with Dr. Lane’s  
10 description. See Menache Rep. at 17 (“The Mova software is launched by clicking an icon, typing a  
11 command in the shell, or launching a third-party application that will, in turn, launch a Mova  
12 software tool into RAM. When the user launches the Mova software, the operating system finds the  
13 location of the executable file on the NVM and copies it into RAM. Once the software is in RAM, it  
14 can be operated by the user or the third-party application while it remains there.”).

15 Rearden’s proposed instruction accurately describes the undisputed anticipated testimony of  
16 both parties’ experts on this point: when DD3 launched the Contour software in connection with its  
17 work on Beauty and the Beast, the entire program was copied to the computer’s RAM, which  
18 enabled DD3 to run and utilize the program. Disney’s instruction falsely suggests that something less  
19 than the entire program (only “code from” the program) was copied. Disney’s implication contradicts  
20 its own expert on the topic and is unsupported by any evidence developed in the case. Disney refused  
21 Rearden’s offered compromise of “all code from,” and its sole justification for “code from” MOVA  
22 is that the language is necessary to distinguish the software from the hardware. This makes no sense,  
23 because the proposed language is “copies of the MOVA Contour software.” There is no risk that the  
24 jury will be confused about whether the copying was as to software versus the cameras, lights, or  
25 rigging of the physical system. As such, the Court should reject Disney’s attempt to inject doubt and  
26 confuse the jury when there is no disputed evidence supporting its formulation of the instruction.

1                   **B. DEFENDANT’S POSITION**

2                   The parties only dispute how to refer to DD3’s copying. Neither party disputes the fact of  
 3 copying or how it was done. *See, e.g.*, Special Instruction 1 – Stipulated Facts at ¶ 4. The dispute is  
 4 over whether to say, as Defendant proposes, DD3 copied “code from” the MOVA Contour software,  
 5 or whether to say DD3 copied “the MOVA Contour software” without referring to “the code from”  
 6 that software, as Plaintiffs propose. The Court should adopt Defendant’s proposal because the  
 7 copyrighted work at issue in this case is the code; that is what was deposited with the Copyright  
 8 Office and what has copyright protection. Copyright protection does not extend beyond the code  
 9 itself to the functionality of the software, and Rearden has no copyright-protected interest in the  
 10 outputs of the software. Yet vaguely informing the jury that the “software” was copied could lead the  
 11 jury to conclude that copyright protection extends further than it actually does. Precision is essential  
 12 to ensure that the jury understands exactly what the infringing act is alleged to be so that they can  
 13 accurately evaluate whether Defendant had the legal right and practical ability to control the alleged  
 14 infringement, and the extent to which Defendant profited (if at all) from the alleged infringement.

15                   Plaintiffs disagreed with including a reference to the code on the parties’ most recent meet  
 16 and confer conference because they claimed to be concerned that Defendant will argue that less than  
 17 all of the code was copied and Plaintiffs will therefore have to address substantiality of copying and  
 18 other issues. This does not make sense. The parties have stipulated to copying and deleted that issue  
 19 from the proposed jury instructions. *See, e.g.*, 17.1 (neither party included “Proof of Copying” in  
 20 model instruction); 17.5 (both parties’ proposals include stipulation on copying and delete  
 21 requirement for Plaintiffs to show copying of original expression from copyrighted work). Plaintiffs  
 22 also argued in the prior jury instructions filing that “DD3 was not simply copying the ‘code’ from the  
 23 MOVA Contour software; it was copying the entire software.” Dkt. 552 at 12. This underscores  
 24 Defendant’s concern about juror confusion. Rearden has claimed that the “entire software” includes  
 25 Maya Scripts—but evidence of Maya Scripts has been excluded. Dkt. 483.

**UNDISPUTED: 1.6 Burden of Proof—Preponderance of the Evidence**

When a party has the burden of proving any claim ~~for~~ affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim ~~for~~ affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.9 What is Evidence**

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I ~~may instruct~~ ~~have instructed~~ you to accept as proved.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.10 What is Not Evidence**

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they ~~{may say}~~ ~~{have said}~~ in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you ~~{are}~~ ~~{have been}~~ instructed to disregard, is not evidence and must not be considered. In addition, some evidence ~~{may be}~~ ~~{was}~~ received only for a limited purpose; when I ~~{instruct}~~ ~~{have instructed}~~ you to consider certain evidence only for a limited purpose, you must do so, and you may not consider that evidence for any other purpose.

(4) Anything you may ~~{see or hear}~~ ~~{have seen or heard}~~ when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.11 Evidence for Limited Purpose**

Some evidence may be admitted only for a limited purpose.

When I instruct you that an item of evidence has been admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.

~~[The testimony [you are about to hear] [you have just heard] may be considered only for the limited purpose of [*describe purpose*] and not for any other purpose.]~~

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).



**UNDISPUTED: 1.12 Direct and Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023); Comment to 1.12.

**UNDISPUTED: 1.13 Ruling on Objections**

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered, or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.14 Credibility of Witnesses**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**DISPUTED: 17.1 Preliminary Instruction—Copyright****1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

The plaintiff, ~~[name of plaintiff]~~, Rearden, claims ownership of a copyright and seeks damages against the defendant, ~~[name of defendant]~~, Disney, for vicarious copyright infringement. ~~The defendant~~ Disney denies infringing ~~the any~~ copyright owned by Rearden ~~[and] [contends that the copyright is invalid] [asserts an affirmative defense, e.g., that it made a fair use of the work].~~ To help you understand the evidence in this case, I will explain some of the legal terms you will hear during this trial.

**DEFINITION OF COPYRIGHT**

The owner of a copyright has the right to exclude any other person from reproducing, distributing, performing, displaying, or preparing derivative works from the work covered by copyright for a specific period of time.

A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, or computer program.

Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries cannot themselves be copyrighted.

The copyrighted work must be original. An original work that closely resembles other works can be copyrighted so long as the similarity between the two works is not the result of copying.

**~~{~~COPYRIGHT INTERESTS~~}~~**

The copyright owner may ~~{transfer}{sell}{convey}~~ to another person all or part of the owner's property interest in the copyright, that is, the right to exclude others from reproducing, distributing, performing, displaying or preparing derivative works from the copyrighted work. ~~To be valid, t~~ The {transfer}{sale}{conveyance} must be in writing and signed by the transferor. The person to whom a right is transferred is called an assignee. ~~or~~

~~[The copyright owner may agree to let another person exclusively reproduce, distribute, perform, display, use, or prepare a derivative work from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the transferor. The person to whom this right is transferred is called an exclusive licensee. The exclusive licensee has the right to exclude others from [describe the rights granted in the license].]~~

### **~~{~~HOW COPYRIGHT IS OBTAINED~~}~~**

Copyright automatically attaches to a work the moment the work is fixed in any tangible medium of expression. The owner of the copyright may apply to register the copyright by completing a registration form and depositing a copy of the copyrighted work with the Copyright Office. After determining that the material deposited constitutes copyrightable subject matter and that certain legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.]

### **PLAINTIFF'S BURDEN OF PROOF**

In this case, the plaintiff, ~~[name of plaintiff]~~ Rearden, contends that the defendant, ~~[name of defendant]~~, has infringed Disney, is liable for the alleged vicarious infringement of the plaintiff's copyright. ~~The plaintiff~~ Rearden has the burden of proving by a preponderance of the evidence that ~~the plaintiff~~ Rearden is the owner of the copyright in the MOVA Contour software and, if so, that ~~the defendant copied original expression~~ Disney is vicariously liable for DD3's unauthorized copying of from the copyrighted work. MOVA Contour software while working on Beauty and the Beast. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that ~~the copyrighted work was infringed~~ Rearden is the owner of the copyright in the MOVA Contour software, and that Disney is liable for vicarious infringement.

~~[The plaintiff must also prove that the defendant's use of the copyrighted work was substantial. In determining whether the defendant's use of the copyrighted work was substantial, you may consider how important the copied portion was to the copyrighted work as a whole.]~~

### **PROOF OF COPYING**

~~To prove that the defendant copied the plaintiff's work, the plaintiff may show that the defendant had access to the plaintiff's copyrighted work and that there are substantial similarities between the defendant's work and the plaintiff's copyrighted work.~~

#### **LIABILITY FOR INFRINGEMENT**

~~One who [reproduces] [publicly distributes] [publicly performs] [publicly displays] [prepares derivative works from] a copyrighted work without authority from the copyright owner during the term of the copyright infringes the copyright.~~ Anyone who copies original expression from a copyrighted work during the term of the copyright without the owner's permission infringes the copyright. The parties have stipulated, and you are instructed, that DD3 copied original expression from the MOVA Contour software by copying the MOVA Contour software into the random access memory of computers that DD3 operated while working on *Beauty and the Beast*. The parties dispute whether Rearden owned the copyright in the MOVA Contour software at the time DD3 copied this code and thus, whether DD3 infringed copyright while working on *Beauty and the Beast*.

~~[Copyright may also be infringed by [vicariously infringing] [and contributorily infringing].]~~

#### **~~{VICARIOUS INFRINGEMENT}~~**

A person is liable for copyright infringement by another if the person has profited directly from the infringing activity and had the right and ability to supervise or control the infringing activity, whether or not the person knew of the infringement. ~~]~~

#### **~~{CONTRIBUTORY INFRINGEMENT}~~**

~~[A person is liable for copyright infringement by another if the person knows or should have known of the infringing activity and [induces ] [or ] [materially contributes to] the activity.]~~

#### **~~{DEFENSES TO INFRINGEMENT}~~**

~~[The defendant contends that there is no copyright infringement. There is no copyright infringement when [the defendant independently created the challenged work] [the defendant made fair use of the copyrighted work by reproducing copies for purposes such as criticism, comment,~~

~~news reporting, teaching, scholarship, or research] [the plaintiff abandoned ownership of the copyrighted work] [the plaintiff misused the copyright by requiring its exclusive use or preventing the development of competing products] [the plaintiff granted the defendant an express license to [use] [copy] [other] the plaintiff's copyrighted work] [the plaintiff granted the defendant an implied license to use the plaintiff's copyrighted work] [the defendant, as an owner of a copy of the plaintiff's copyrighted work, resold that copy after the plaintiff made the first sale].]~~

**AUTHORITY:** Ninth Circuit Model Jury Instruction 17.1 (altered to select appropriate text from bracketed options based on the claims and defenses in this case, identify the parties, describe the claims and issues, and otherwise conform the instruction to the facts and issues).

#### **B. DEFENDANT'S PROPOSED INSTRUCTION:**

The plaintiff, ~~[name of plaintiff]~~, Rearden, claims ownership of a copyright and seeks damages against the defendant, ~~[name of defendant]~~, Disney, for vicarious copyright infringement. ~~The defendant~~ Disney denies infringing any copyright owned by Rearden ~~[and] [contends that the copyright is invalid] [asserts an affirmative defense, e.g., that it made a fair use of the work].~~ To help you understand the evidence in this case, I will explain some of the legal terms you will hear during this trial.

#### **DEFINITION OF COPYRIGHT**

The owner of a copyright has the right to exclude any other person from reproducing, distributing, performing, displaying, or preparing derivative works from the work covered by copyright for a specific period of time.

A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, or computer program.

1 Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or  
2 discoveries cannot themselves be copyrighted.

3 The copyrighted work must be original. An original work that closely resembles other works  
4 can be copyrighted so long as the similarity between the two works is not the result of copying.

### 5 **{COPYRIGHT INTERESTS}**

6  
7 {The copyright owner may {transfer}{sell}{convey} to another person all or part of the  
8 owner's property interest in the copyright, that is, the right to exclude others from reproducing,  
9 distributing, performing, displaying or preparing derivative works from the copyrighted work. ~~To be~~  
10 ~~valid, t~~he {transfer}{sale}{conveyance} must be in writing and signed by the transferor. The  
11 person to whom a right is transferred is called an assignee-}.

12 ~~or~~

13 ~~{The copyright owner may agree to let another person exclusively reproduce, distribute,~~  
14 ~~perform, display, use, or prepare a derivative work from the copyrighted work. To be valid, the~~  
15 ~~{transfer}{sale}{conveyance} must be in writing and signed by the transferor. The person to~~  
16 ~~whom this right is transferred is called an exclusive licensee. The exclusive licensee has the~~  
17 ~~right to exclude others from [describe the rights granted in the license].}~~

### 18 **{HOW COPYRIGHT IS OBTAINED}**

19  
20 {Copyright automatically attaches to a work the moment the work is fixed in any tangible  
21 medium of expression. ~~The owner of the copyright may apply to register the copyright by~~  
22 ~~completing a registration form and depositing a copy of the copyrighted work with the Copyright~~  
23 ~~Office. After determining that the material deposited constitutes copyrightable subject matter~~  
24 ~~and that certain legal and formal requirements are satisfied, the Register of Copyrights registers~~  
25 ~~the work and issues a certificate of registration to the copyright owner.}~~

### 26 **PLAINTIFF'S BURDEN OF PROOF**



1 In this case, the plaintiff, ~~[name of plaintiff]~~ Rearden, contends that the defendant, ~~[name of~~  
 2 ~~defendant]~~, ~~has infringed~~ Disney, is liable for the alleged vicarious infringement of the plaintiff's  
 3 copyright. ~~The plaintiff~~ Rearden has the burden of proving by a preponderance of the evidence that  
 4 ~~the plaintiff~~ Rearden is the owner of the copyright in the MOVA Contour software and, if so, that ~~the~~  
 5 ~~defendant copied original expression~~ Disney is vicariously liable for DD3's unauthorized copying  
 6 of code from the ~~copyrighted work~~ MOVA Contour software while working on *Beauty and the*  
 7 *Beast*. Preponderance of the evidence means that you must be persuaded by the evidence that it is  
 8 more probably true than not true that ~~the copyrighted work was infringed~~ Rearden is the owner of  
 9 the copyright in the MOVA Contour software, and that Disney is liable for vicarious infringement.

10 ~~[The plaintiff must also prove that the defendant's use of the copyrighted work was~~  
 11 ~~substantial. In determining whether the defendant's use of the copyrighted work was substantial,~~  
 12 ~~you may consider how important the copied portion was to the copyrighted work as a whole.]~~

### 13 **PROOF OF COPYING**

14  
 15 ~~To prove that the defendant copied the plaintiff's work, the plaintiff may show that the~~  
 16 ~~defendant had access to the plaintiff's copyrighted work and that there are substantial similarities~~  
 17 ~~between the defendant's work and the plaintiff's copyrighted work.~~

### 18 **LIABILITY FOR INFRINGEMENT**

19 ~~One who [reproduces] [publicly distributes] [publicly performs] [publicly displays]~~  
 20 ~~[prepares derivative works from] a copyrighted work without authority from the copyright owner~~  
 21 ~~during the term of the copyright infringes the copyright.~~ Anyone who copies original expression from  
 22 a copyrighted work during the term of the copyright without the owner's permission infringes the  
 23 copyright. The parties have stipulated, and you are instructed, that DD3 copied original expression  
 24 from the MOVA Contour software by copying code from the MOVA Contour software into the  
 25 random access memory of computers that DD3 operated while working on *Beauty and the Beast*.  
 26 DD3's conduct constitutes infringement only if Rearden owned the copyright in the MOVA Contour  
 27 software at the time DD3 copied the code.

1           ~~{Copyright may also be infringed by {vicariously infringing}{contributorily infringing}.}~~

2                               ~~{VICARIOUS INFRINGEMENT}~~

3

4           ~~{A person is liable for copyright infringement by another if the person has profited directly~~  
 5 ~~from the infringing activity and had the legal right and practical ability to supervise or control the~~  
 6 ~~infringing activity, whether or not the person knew of the infringement.}.~~

7                               ~~{CONTRIBUTORY INFRINGEMENT}~~

8

9           ~~{A person is liable for copyright infringement by another if the person knows or should have~~  
 10 ~~known of the infringing activity and {induces } {or } {materially contributes to} the activity.}~~

11                              ~~{DEFENSES TO INFRINGEMENT}~~

12           ~~{The defendant contends that there is no copyright infringement. There is no copyright~~  
 13 ~~infringement when {the defendant independently created the challenged work} {the defendant made~~  
 14 ~~fair use of the copyrighted work by reproducing copies for purposes such as criticism, comment,~~  
 15 ~~news reporting, teaching, scholarship, or research} {the plaintiff abandoned ownership of the~~  
 16 ~~copyrighted work} {the plaintiff misused the copyright by requiring its exclusive use or preventing~~  
 17 ~~the development of competing products} {the plaintiff granted the defendant an express license to~~  
 18 ~~{use} {copy} {other} the plaintiff's copyrighted work} {the plaintiff granted the defendant an implied~~  
 19 ~~license to use the plaintiff's copyrighted work} {the defendant, as an owner of a copy of the~~  
 20 ~~plaintiff's copyrighted work, resold that copy after the plaintiff made the first sale}.}~~

21

22   **AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May  
 23 2023); Ninth Circuit Model Civil Jury Instructions, Comment to 17.20; *Williams v. Gaye*, 895 F.3d  
 24 1106, 1132 (9th Cir. 2018); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir.  
 25 2007); Order on Motion for Summary Judgment (Dkt. 555).

## 2. PARTIES' POSITION STATEMENTS

### A. PLAINTIFFS' POSITION

The dispute over this instruction includes the “copied code from the MOVA Contour software” vs. “copied the MOVA Contour software” language discussed in connection with Disputed Preliminary Instruction 1.5. In the paragraph headed “Plaintiff’s Burden of Proof” Rearden’s proposal reads “. . . DD3’s unauthorized copying of the MOVA Contour software . . . .” while Disney’s proposal reads “. . . DD3’s unauthorized copying of code from the MOVA Contour software . . . .” The paragraph headed “Liability for Infringement” contains a similar difference. For the reasons stated in response to Disputed Instruction 1.5, Rearden requests that the Court adopt its proposed “copied the MOVA Contour software” language as the more accurate statement.

Rearden’s version of this instruction also includes the optional section “How Copyright is Obtained,” which Disney’s version omits. Rearden contends that it should be included because it is drawn verbatim from the Model Instruction, and because Disney is contesting Rearden’s ownership of the copyright in the MOVA Contour software. Although the parties have stipulated to certain facts relating to the origins of the software and its copyright, the jury will benefit from an explanation of how copyrights and copyright certificates are obtained. This portion of the instruction provides important context for Undisputed Instructions 17.12 (Copyright Interests – Assignee), 17.6 (Copyright Infringement – Ownership of Valid Copyright – Definition), and 17.7 (Copyright Infringement - Copyright Registration Certificate (17 U.S.C. § 410(c)). The proposed text is an accurate statement of the law, creates no risk of jury confusion, and provides a brief introduction to the concept of copyright ownership and certification that will be covered in more detail in the jury’s final instructions; as such, it should be included in this preliminary instruction.

### B. DEFENDANT’S POSITION

Defendant proposes the addition of “legal” before “right” and “practical” before “ability” in the section on “Vicarious Infringement,” consistent with Ninth Circuit case law and this Court’s Order on Defendant’s motion for summary judgment, all of which contain this exact language. *See*

1 *Williams v. Gaye*, 895 F.3d 1106, 1132 (9th Cir. 2018) (“A vicarious infringer ‘exercises control  
 2 over a direct infringer when he has both a *legal right* to stop or limit the directly infringing conduct,  
 3 as well as the *practical ability* to do so.”) (emphasis added) (quoting *Perfect 10, Inc. v.*  
 4 *Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007); Dkt. 555 at 9 (Court’s summary judgment  
 5 Order quoting the same language from *Williams* and holding that “there is a genuine issue of material  
 6 fact as to whether Disney had the *practical ability* to stop or limit the infringing conduct ...”) (emphasis added). The Court should adopt Defendant’s proposal because it is the correct statement  
 7 of the legal standard and will help the jury understand their charge. Where, as here, the model  
 8 instruction “does not accurately track” the controlling law, the Court should conform the model to  
 9 the governing legal standard. *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 869  
 10 (9th Cir. 2020) (“[B]ecause th[e] instruction [given by the district court and derived from the Ninth  
 11 Circuit Model] does not accurately track our functionality caselaw, its use was error and we must  
 12 reverse.”) (citation omitted). The Comment to Model Instruction 17.20 specifically contemplates  
 13 that in “certain cases, it may be appropriate to instruct the jury on the meaning of ‘right and ability to  
 14 supervise or control.’” Ninth Circuit Manual of Model Civil Jury Instructions at 445. It would be  
 15 appropriate to do so here, as without some further explication, a lay jury unfamiliar with the  
 16 application of the legal standard is likely to be confused.

18 Defendant’s proposal is a modest, two-word adjustment to the model instruction to achieve  
 19 the exact purpose contemplated by the Ninth Circuit’s comment and to ensure the instructions are  
 20 consistent with the case law that the Court and all of the parties have applied to this case. Using the  
 21 same words the Ninth Circuit did—“legal” and “practical”—clarifies what for lay jurors are not self-  
 22 evident concepts. Modifying “right” with “legal” makes it clear to jurors that the defendant must  
 23 have legal authority to take action, not a moral or amorphous right to do so. Likewise, modifying  
 24 “ability” with “practical” makes it clear that the defendant must have the realistic, and not simply the  
 25 theoretical, ability to supervise or control the infringement. The latter clarification is critical in this  
 26 case. The Court’s summary judgment ruling concluded that a jury could, not that it must, find that  
 27 the contract with DD3 gave Defendant the ability to stop DD3’s use of MOVA. The ruling finds it is  
 28

1 a jury question whether Defendant had the *practical* ability to stop that use, in light of facts showing  
 2 the difficulty of detecting the alleged infringement and policing hundreds of vendors and  
 3 technologies that Defendant used to make a major motion picture.

4 Not only did the Court and Defendant cite and apply this standard in the summary judgment  
 5 Order and motion respectively, but Plaintiffs also did the same. *See, e.g.*, Dkt. 555 at 9-12 (Court’s  
 6 summary judgment order); Dkt. 451 at 9-17 (Plaintiffs’ summary judgment opposition); Dkt. 421 at  
 7 11-17 (Defendant’s motion for summary judgment). Plaintiffs quoted the exact same language from  
 8 *Williams* that the Court applied in its summary judgment Order and that Defendant proposes to add  
 9 to the model instruction here. *See* Dkt. 451 at 9.

10 At the parties’ most recent meet and confer conference, however, Plaintiffs reversed course  
 11 and claimed that the very standard they quoted in their summary judgment briefing did not actually  
 12 apply here. In particular, Plaintiffs claimed that the question of whether a defendant has the  
 13 “practical ability” to control the infringement applies only in the online context, where technical  
 14 constraints supposedly make it uniquely difficult to detect infringement. There is no authority for  
 15 Plaintiffs’ new position. No case that Defendant has seen states that only certain technical Internet  
 16 cases are subject to the “practical ability” standard. To the contrary, *Williams*—the Ninth Circuit  
 17 case on vicarious infringement that the Court cited in its summary judgment ruling—discusses the  
 18 “practical ability” to control the infringement, but it is not a case involving online infringement or  
 19 highly technical details; it was a standard copyright infringement case based on the music  
 20 composition copyright in the song *Got to Give It Up*. The same is true of the *scores* of other cases  
 21 that have stated the applicable standard as “legal right” and “practical ability” and that do not involve  
 22 infringement in the online context. *See, e.g., Range Road Music, Inc. v. East Coast Foods, Inc.*, 668  
 23 F.3d 1148, 1155 (9th Cir. 2012) (public performance of infringing musical works at restaurant and  
 24 lounge); *Liguori v. Hansen*, 752 F. App’x 389, 392 (9th Cir. 2018) (infringing logo on souvenir  
 25 book); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 389 (3d Cir. 2016) (copyrighted photos  
 26 infringingly reproduced, publicly displayed, and distributed on magazines, merchandise, motion  
 27 pictures, and other locations); *Kevin Barry Fine Art Assocs. v. Ken Gangbar Studio, Inc.*, 391 F.

Supp. 3d 959, 968-69 (N.D. Cal. 2019) (reproduction of infringing sculptural works for use in restaurant); *Oregon Catholic Press v. Ambrosetti*, 218 F. Supp. 3d 1158, 1165 (D. Or. 2016) (reproduction and distribution of musical works in church hymnals); *Adobe Sys. Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1053-55 (C.D. Cal. 2001) (sale of infringing software at computer fairs); *Rams v. Def Jam Recordings, Inc.*, 202 F.Supp.3d 376, 385 (S.D.N.Y. 2016) (copyrighted image used as infringing album cover art); *Payne v. Manilow*, 2019 WL 4149357, at \*2 (C.D. Cal. July 11, 2019) (infringing public displays at concerts and award shows of copyrighted motion picture); *Kilina Am., Inc. v. Bonded Apparel, Inc.*, 2019 WL 8065854, at \*2 (Nov. 19, 2019) (alleged infringement of fabric design); *Broad. Music, Inc. v. Five Star Enters., LLC*, 2018 WL 4492481, at \*3 (D. Nev. Sept. 19, 2018) (infringing public performances of copyrighted music at restaurant).

The requirement that the defendant must have the “practical ability” to control the infringement is not limited to the online context—it is a fundamental element of vicarious liability that applies in every case. *See, e.g., Paramount Pictures Corp. v. Int’l Media Films Inc.*, 2013 WL 3215189, at \*14 (C.D. Cal. June 12, 2013) (holding in case involving infringing distribution of motion picture that “[t]he test for right or ability to supervise infringing requires both ‘a legal right to stop or limit the directly infringing conduct ... [and] the practical ability to do so.’”) (internal alterations in original) (citation omitted); *Kevin Barry Fine Art Assocs.*, 391 F. Supp. 3d at 968-69 (“As to vicarious liability, one is liable ‘[1] by profiting from direct infringement while [2] declining to exercise a right to stop or limit it.’ [citations] The second prong, which the Ninth Circuit refers to as the ‘control’ element, requires that the defendant ‘ha[d] both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.’”) (citations omitted); *Kilina Am., Inc. v. SA & PW, Inc.*, 2019 WL 8685066, at \*2 (C.D. Cal. Aug. 27, 2019) (“Any pressure that [alleged vicarious infringer] could feasibly put on [direct infringer] falls far short of the “legal right” and “practical ability” to control necessary to impose vicarious liability.”).

It is critical for the jury to understand that a copyright defendant’s liability for someone else’s conduct cannot be imposed just because in some remote or theoretical but completely impractical

1 sense the defendant may have the ability to control the infringement. *See, e.g., Millennium Funding,*  
 2 *Inc. v. 1701 Mgmt. LLC*, 576 F. Supp. 3d 1192, 1215 (S.D. Fla. 2021) (“[T]he plaintiff must allege  
 3 that the defendant has a ‘practical ability to police the infringing activities of [third parties] as  
 4 opposed to suggesting measures that are imprecise, overbroad or not workable.’”) (citation omitted);  
 5 *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174 (9th Cir. 2007) (similar). The  
 6 concept of vicarious liability is not that expansive. As case after case has affirmed, the standard  
 7 requires that the defendant have the *practical* ability to actually do something about the  
 8 infringement. The jury should be so instructed.

9 In the parties’ most recent meet and confer, Plaintiffs also claimed that adding the word  
 10 “legal” before “right” would confuse the jury and lead them to believe that they are being asked to  
 11 draw a legal conclusion. That does not make sense. As discussed, “legal right” will help the jury  
 12 understand that they must do more than evaluate whether this is morally “right” or just.

13 Because Defendant’s proposal accurately reflects current Ninth Circuit law and will assist the  
 14 jury with understanding the standard, the Court should adopt Defendant’s proposal.

15 Further, including the full optional model section “How Copyright Is Obtained,” as Rearden  
 16 proposes, is confusing, misleading, and could cause the jury to err because the model language  
 17 assumes ownership when that issue is disputed in this case. Instructing the jury that “[t]he *owner* of  
 18 the copyright may apply to register the copyright ...” and that the Register of Copyright “issues a  
 19 certificate of registration to the copyright *owner*” is incorrect and highly prejudicial, because it is for  
 20 the jury to decide whether Rearden was the owner when it registered the copyright in 2016 and  
 21 received the certificate. This is optional text in the model instruction, so there is no reason to include  
 22 it when inapplicable and erroneous in this case. The jury will be separately instructed on copyright  
 23 registration in 17.7, so there is no prejudice to Plaintiffs in removing this section from this  
 24 preliminary instruction. Plaintiffs asserted during meet and confer that they included this instruction  
 25 because it is important for the jury to understand that a work can be registered after the copyright  
 26 attaches to it. Defendant’s proposed instruction accomplishes this without the confusing and  
 27  
 28



1 misleading language Plaintiffs propose keeping, because Defendant’s proposal just keeps the first  
2 sentence of this optional section, which addresses Plaintiffs’ stated issue.

3 Lastly, the parties dispute how to refer to DD3’s copying. Neither party disputes the fact of  
4 copying or how it was done. *See, e.g.*, Special Instruction 1 – Stipulated Facts at ¶ 4. The dispute is  
5 over whether to say, as Defendant proposes, DD3 copied “code from” the MOVA Contour software,  
6 or whether to say DD3 copied “the MOVA Contour software” without referring to “the code from”  
7 that software, as Plaintiffs propose. The Court should adopt Defendant’s proposal because the  
8 copyrighted work at issue in this case is the code; that is what was deposited with the Copyright  
9 Office and what has copyright protection. Copyright protection does not extend beyond the code  
10 itself to the functionality of the software, and Rearden has no copyright-protected interest in the  
11 outputs of the software. Yet vaguely informing the jury that the “software” was copied could lead the  
12 jury to conclude that copyright protection extends further than it actually does. Precision is essential  
13 to ensure that the jury understands exactly what the infringing act is alleged to be so that they can  
14 accurately evaluate whether Defendant had the legal right and practical ability to control the alleged  
15 infringement, and the extent to which Defendant profited (if at all) from the alleged infringement.

16 Plaintiffs disagreed with including a reference to the code on the parties’ most recent meet  
17 and confer conference because they claimed to be concerned that Defendant will argue that less than  
18 all of the code was copied and Plaintiffs will therefore have to address substantiality of copying and  
19 other issues. This does not make sense. The parties have stipulated to copying and deleted that issue  
20 from the proposed jury instructions. *See, e.g.*, 17.1 (neither party included “Proof of Copying” in  
21 model instruction); 17.5 (both parties’ proposals include stipulation on copying and delete  
22 requirement for Plaintiffs to show copying of original expression from copyrighted work). Plaintiffs  
23 also argued in the prior jury instructions filing that “DD3 was not simply copying the ‘code’ from the  
24 MOVA Contour software; it was copying the entire software.” Dkt. 552 at 12. This underscores  
25 Defendant’s concern about juror confusion. Rearden has claimed that the “entire software” includes  
26 Maya Scripts—but evidence of Maya Scripts has been excluded. Dkt. 483.



**UNDISPUTED: 1.15 Conduct of the Jury**

I will now say a few words about your conduct as jurors.

First, keep an open mind throughout the trial, and do not decide what the verdict should be until you and your fellow jurors have completed your deliberations at the end of the case.

Second, because you must decide this case based only on the evidence received in the case and on my instructions as to the law that applies, you must not be exposed to any other information about the case or to the issues it involves during the course of your jury duty. Thus, until the end of the case or unless I tell you otherwise:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, or computer, or any other electronic means, via email, text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, Tiktok, or any other forms of social media. This applies to communicating with your fellow jurors until I give you the case for deliberation, and it applies to communicating with everyone else including your family members, your employer, the media or press, and the people involved in the trial, although you may notify your family and your employer that you have been seated as a juror in the case, and how long you expect the trial to last. But, if you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and report the contact to the court.

Because you will receive all the evidence and legal instruction you properly may consider to return a verdict: do not read, watch or listen to any news or media accounts or commentary about the case or anything to do with it<sup>F</sup>, although I have no information that there will be news reports about this case<sup>F</sup>; do not do any research, such as consulting dictionaries, searching the Internet, or using other reference

1 materials; and do not make any investigation or in any other way try to learn about the  
2 case on your own. Do not visit or view any place discussed in this case, and do not  
3 use the Internet or any other resource to search for or view any place discussed during  
4 the trial. Also, do not do any research about this case, the law, or the people  
5 involved—including the parties, the witnesses or the lawyers—until you have been  
6 excused as jurors. If you happen to read or hear anything touching on this case in the  
7 media, turn away and report it to me as soon as possible.

8 These rules protect each party’s right to have this case decided only on evidence that has been  
9 presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of  
10 their testimony is tested through the trial process. If you do any research or investigation outside the  
11 courtroom, or gain any information through improper communications, then your verdict may be  
12 influenced by inaccurate, incomplete or misleading information that has not been tested by the trial  
13 process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case  
14 based on information not presented in court, you will have denied the parties a fair trial. Remember,  
15 you have taken an oath to follow the rules, and it is very important that you follow these rules.

16 A juror who violates these restrictions jeopardizes the fairness of these proceedings<sup>15.2</sup> and a  
17 mistrial could result that would require the entire trial process to start over<sup>15.2</sup>. If any juror is exposed  
18 to any outside information, please notify the court immediately.

19  
20 **AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May  
21 2023).

**UNDISPUTED: 1.16 Publicity During Trial**

If there is any news media account or commentary about the case or anything to do with it, you must ignore it. You must not read, watch, or listen to any news media account or commentary about the case or anything to do with it. The case must be decided by you solely and exclusively on the evidence that will be received in the case and on my instructions as to the law that applies. If any juror is exposed to any outside information, please notify me immediately.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.17 No Transcript Available to Jury**

I urge you to pay close attention to the trial testimony as it is given. During deliberations you will not have a transcript of the trial testimony.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.18 Taking Notes**

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you go to the jury room to decide the case. Do not let notetaking distract you. When you leave, your notes should be left in the ~~[courtroom]~~ [jury room] ~~[envelope in the jury room]~~. No one will read your notes. When the trial is concluded, I will order that your notes be collected and destroyed.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of other jurors.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.19 Questions to Witnesses by Jurors During Trial**

*~~Option 1~~*

Only the lawyers and I are allowed to ask questions of witnesses. A juror is not permitted to ask questions of witnesses. ~~*[Specific reasons for not allowing jurors to ask questions may be explained.]*~~ If, however, you are unable to hear a witness or a lawyer, please raise your hand and I will correct the situation.

*~~Option 2~~*

~~*When attorneys have finished their examination of a witness, you may ask questions of the witness. [Describe procedure to be used.] If the rules of evidence do not permit a particular question, I will advise you. After your questions, if any, the attorneys may ask additional questions.*~~

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.20 Bench Conferences and Recesses**

From time to time during the trial, it ~~{may become}~~~~{became}~~ necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury ~~{is}~~~~{was}~~ present in the courtroom, which is called a sidebar, or by calling a recess. Please understand that while you ~~{are}~~~~{were}~~ waiting, we ~~{are}~~~~{were}~~ working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we ~~{will do}~~~~{have done}~~ what we ~~{can}~~~~{could}~~ to keep the number and length of these conferences to a minimum. I ~~{may}~~~~{did}~~ not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.21 Outline of Trial**

Trials proceed in the following way: First, each side may make an opening statement. An opening statement is not evidence. It is simply an outline to help you understand what that party expects the evidence will show. A party is not required to make an opening statement.

The plaintiff will then present evidence, and counsel for the defendant may cross-examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-examine.

After the evidence has been presented, I will instruct you on the law that applies to the case and the attorneys will make closing arguments.

After that, you will go to the jury room to deliberate on your verdict.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).



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7 **II.**  
8 **CAUTIONARY AND EXPLANATORY INSTRUCTIONS**  
9 **(DURING TRIAL)**  
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**UNDISPUTED: 2.0 CAUTIONARY INSTRUCTIONS****At the End of Each Day of the Case:**

As I indicated before this trial started, you as jurors will decide this case based solely on the evidence presented in this courtroom. This means that, after you leave here for the night, you must not conduct any independent research about this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see while browsing the internet or your social media feeds.

**At the Beginning of Each Day of the Case:**

As I reminded you yesterday and continue to emphasize to you today, it is important that you decide this case based solely on the evidence and the law presented here. So you must not learn any additional information about the case from sources outside the courtroom. To ensure fairness to all parties in this trial, I will now ask each of you whether you have learned about or shared any information about this case outside of this courtroom, even if it was accidental.

[ALTERNATIVE 1 (in open court): if you think that you might have done so, please let me know now by raising your hand. [Wait for a show of hands]. I see no raised hands; however, if you would prefer to talk to the court privately in response to this question, please notify a member of the court's staff at the next break. Thank you for your careful adherence to my instructions.]

~~[ALTERNATIVE 2 (during voir dire with each juror, individually): Have you learned about or shared any information about this case outside of this courtroom? . . . Thank you for your careful adherence to my instructions.]~~

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.11 USE OF INTERROGATORIES**

Evidence ~~will now be~~ ~~was~~ presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.12 USE OF REQUESTS FOR ADMISSION**

Evidence ~~will now be~~ ~~was~~ presented to you in the form of admissions to the truth of certain facts. These admissions were given in writing before the trial, in response to requests that were submitted under established court procedures. You must treat these facts as having been proved.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.13 EXPERT OPINION**

You ~~[have heard]~~ [are about to hear] testimony from [name] who ~~[testified]~~ [will testify] about [his] [her] opinions and the reasons for those opinions. This opinion testimony is allowed, because of the ~~specialized knowledge, skill,~~ education or experience, ~~training, or education~~ of this witness.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness's specialized knowledge, skill, experience, training, or education, the reasons given for the opinion, and all the other evidence in the case.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

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8 **III.**  
9 **FINAL INSTRUCTIONS**  
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**UNDISPUTED: 1.4 Duty of Jury** ~~(Court Reads and Provides Written Instructions at End of Case)~~

Members of the Jury: Now that you have heard all of the evidence ~~[and the arguments of the attorneys]~~, it is my duty to instruct you on the law that applies to this case.

~~[Each of you has received a copy of these instructions that you may take with you to the jury room to consult during your deliberations.]~~

~~or~~

~~[A copy of these instructions will be sent to the jury room for you to consult during your deliberations.]~~

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

Please do not read into these instructions or anything that I may say or do or have said or done that I have an opinion regarding the evidence or what your verdict should be.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**DISPUTED: 1.5 Claims and Defenses****1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

To help you follow the evidence, I will give you a brief summary of the positions of the parties:

The plaintiffs in this case are Rearden LLC and Rearden MOVA LLC. I will refer to them collectively as “plaintiff-asserts” or “Rearden.”

The defendant in this case is Walt Disney Pictures, which I may also refer to as “defendant” or “Disney.” Walt Disney Pictures has stipulated and agreed that ~~[plaintiff's claims]~~ any acts or omissions of any employees of Disney Enterprises, Inc., Disney Studio Production Services Co., LLC f/k/a Walt Disney Pictures Production, LLC or Chip Pictures, Inc. relating to matters in issue in this case are equally attributable to Walt Disney Pictures for purposes of this case.

The plaintiff~~-has~~, Rearden, is suing the defendant, Disney, for copyright infringement. As the plaintiff, Rearden bears the burden of proving ~~these~~its claim of copyright infringement by a preponderance of the evidence.

Rearden claims~~-~~ that it owns a copyright in the MOVA Contour software and that non-party Digital Domain 3.0, Inc. (“DD3”) directly infringed Rearden’s copyright by making unauthorized copies of the MOVA Contour software into the random access memory of computers that DD3 operated while working on the 2017 Disney live-action movie *Beauty and the Beast*. Rearden claims that Disney is vicariously liable for DD3’s alleged infringement.

~~The defendant denies those claims [and also contends that [defendant’s counterclaims and/or affirmative defenses]]. [The defendant has the burden of proof on these [counterclaims and/or affirmative defenses.]]~~

~~[The plaintiff denies [defendant’s counterclaims and/or affirmative defenses].]~~

In response, Disney claims that DD3 did not infringe any copyright owned by Rearden when DD3 copied the MOVA Contour software while working on the movie, and that Disney is not in any



1 event vicariously liable for any infringement of the copyright in the MOVA Contour software by  
 2 DD3.

3  
 4 **AUTHORITY:** Ninth Circuit Model Jury Instruction 1.5. Changes to the Model Instruction have  
 5 been made to identify the parties and to state the positions of each party.

6  
 7 **B. DEFENDANT’S PROPOSED INSTRUCTION:**

8 ~~To help you follow~~ As I did at the ~~evidence~~ beginning of the trial, I will give you a brief  
 9 summary of the positions of the parties:

10 The plaintiffs in this case are Rearden LLC and Rearden MOVA LLC. I will refer to them  
 11 collectively as “plaintiff-asserts” or “Rearden.”

12 The defendant in this case is Walt Disney Pictures, which I may also refer to as “defendant”  
 13 or “Disney.” Walt Disney Pictures has stipulated and agreed that ~~[plaintiff’s claims]~~ any acts or  
 14 omissions of any employees of Disney Enterprises, Inc., Disney Studio Production Services Co.,  
 15 LLC f/k/a Walt Disney Pictures Production, LLC or Chip Pictures, Inc. relating to matters in issue in  
 16 this case are equally attributable to Walt Disney Pictures for purposes of this case.

17 The plaintiff ~~has~~, Rearden, is suing the defendant, Disney, for copyright infringement. As  
 18 the plaintiff, Rearden bears the burden of proving ~~these~~ its claim of copyright infringement by a  
 19 preponderance of the evidence.

20 Rearden claims that it owns a copyright in the MOVA Contour software and that non-party  
 21 Digital Domain 3.0, Inc. (“DD3”) directly infringed Rearden’s copyright by making unauthorized  
 22 copies of code from the MOVA Contour software into the random access memory of computers that  
 23 DD3 operated while working on the 2017 Disney live-action movie *Beauty and the Beast*. Rearden  
 24 claims that Disney is vicariously liable for DD3’s alleged infringement.

25 ~~The defendant denies those claims [and also contends that [defendant’s counterclaims and/or~~  
 26 ~~affirmative defenses]]. [The defendant has the burden of proof on these [counterclaims and/or~~  
 27 ~~affirmative defenses.]]~~

~~[The plaintiff denies [defendant's counterclaims and/or affirmative defenses].]~~

In response, Disney claims that DD3 did not infringe any copyright owned by Rearden when DD3 copied code from MOVA Contour software while working on the movie, and that Disney is not in any event vicariously liable for any infringement of the copyright in the MOVA Contour software by DD3.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

## **2. PARTIES' POSITION STATEMENTS**

### **A. PLAINTIFFS' POSITION**

Rearden's proposed Instruction 1.5 for the jury's Final Instructions is the same as its proposal for the Preliminary Instructions, and the only dispute is whether, as with the preliminary instruction, it should refer to DD3 making "copies of the MOVA Contour software," or "copies of code from the MOVA Contour software." Rearden will not repeat its arguments here, but refers back to its position statement regarding Disputed Instruction 1.5 in the Preliminary Instructions.

### **B. DEFENDANT'S POSITION**

The parties only dispute how to refer to DD3's copying. Neither party disputes the fact of copying or how it was done. See, e.g., Special Instruction 1 – Stipulated Facts at ¶ 4. The dispute is over whether to say, as Defendant proposes, DD3 copied "code from" the MOVA Contour software, or whether to say DD3 copied "the MOVA Contour software" without referring to "the code from" that software, as Plaintiffs propose. The Court should adopt Defendant's proposal because the copyrighted work at issue in this case is the code; that is what was deposited with the Copyright Office and what has copyright protection. Copyright protection does not extend beyond the code itself to the functionality of the software, and Rearden has no copyright-protected interest in the outputs of the software. Yet vaguely informing the jury that the "software" was copied could lead the

1 jury to conclude that copyright protection extends further than it actually does. Precision is essential  
2 to ensure that the jury understands exactly what the infringing act is alleged to be so that they can  
3 accurately evaluate whether Defendant had the legal right and practical ability to control the alleged  
4 infringement, and the extent to which Defendant profited (if at all) from the alleged infringement.

5 Plaintiffs disagreed with including a reference to the code on the parties' most recent meet  
6 and confer conference because they claimed to be concerned that Defendant will argue that less than  
7 all of the code was copied and Plaintiffs will therefore have to address substantiality of copying and  
8 other issues. This does not make sense. The parties have stipulated to copying and deleted that issue  
9 from the proposed jury instructions. See, e.g., 17.1 (neither party included "Proof of Copying" in  
10 model instruction); 17.5 (both parties' proposals include stipulation on copying and delete  
11 requirement for Plaintiffs to show copying of original expression from copyrighted work). Plaintiffs  
12 also argued in the prior jury instructions filing that "DD3 was not simply copying the 'code' from the  
13 MOVA Contour software; it was copying the entire software." Dkt. 552 at 12. This underscores  
14 Defendant's concern about juror confusion. Rearden has claimed that the "entire software" includes  
15 Maya Scripts—but evidence of Maya Scripts has been excluded. Dkt. 483.

**UNDISPUTED: 1.6 Burden of Proof—Preponderance of the Evidence**

When a party has the burden of proving any claim ~~for~~ affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim ~~for~~ affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.9 What is Evidence**

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits that are admitted into evidence;
3. any facts to which the lawyers have agreed; and
4. any facts that I ~~[may instruct]~~ [have instructed] you to accept as proved.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.10 What is Not Evidence**

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they ~~[may say]~~ ~~[have said]~~ in their opening statements, closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

(2) Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

(3) Testimony that is excluded or stricken, or that you ~~[are]~~ ~~[have been]~~ instructed to disregard, is not evidence and must not be considered. In addition, some evidence ~~[may be]~~ ~~[was]~~ received only for a limited purpose; when I ~~[instruct]~~ ~~[have instructed]~~ you to consider certain evidence only for a limited purpose, you must do so, and you may not consider that evidence for any other purpose.

(4) Anything you may ~~[see or hear]~~ ~~[have seen or heard]~~ when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.11 Evidence for Limited Purpose**

Some evidence may be admitted only for a limited purpose.

~~When~~If I ~~instruct~~have instructed you that an item of evidence ~~has been~~was admitted only for a limited purpose, you must consider it only for that limited purpose and not for any other purpose.

~~[The testimony [you are about to hear] [you have just heard] may be considered only for the limited purpose of [describe purpose] and not for any other purpose.]~~

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.12 Direct and Circumstantial Evidence**

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact.

By way of example, if you wake up in the morning and see that the sidewalk is wet, you may find from that fact that it rained during the night. However, other evidence, such as a turned-on garden hose, may provide a different explanation for the presence of water on the sidewalk. Therefore, before you decide that a fact has been proved by circumstantial evidence, you must consider all the evidence in the light of reason, experience, and common sense.

You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023); Comment to 1.12.



**UNDISPUTED: 1.13 Ruling on Objections**

There are rules of evidence that control what can be received into evidence. When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered, or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may ~~order~~have ordered that evidence be stricken from the record and that you were to disregard or ignore that evidence. That means when you are deciding the case, you must not consider the stricken evidence for any purpose.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.14 Credibility of Witnesses**

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it. In considering the testimony of any witness, you may take into account:

- (1) the opportunity and ability of the witness to see or hear or know the things testified to;
- (2) the witness's memory;
- (3) the witness's manner while testifying;
- (4) the witness's interest in the outcome of the case, if any;
- (5) the witness's bias or prejudice, if any;
- (6) whether other evidence contradicted the witness's testimony;
- (7) the reasonableness of the witness's testimony in light of all the evidence; and
- (8) any other factors that bear on believability.

Sometimes a witness may say something that is not consistent with something else he or she said. Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remember. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said. On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify. What is important is how believable the witnesses were, and how much weight you think their testimony deserves.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 1.20 Bench Conferences and Recesses**

From time to time during the trial, it ~~[may become]~~ [became] necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury ~~[is]~~ [was] present in the courtroom, which is called a sidebar, or by calling a recess. Please understand that while you ~~[are]~~ [were] waiting, we ~~[are]~~ [were] working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we ~~[will do]~~ [have done] what we ~~[can]~~ [could] to keep the number and length of these conferences to a minimum. I ~~[may]~~ [did] not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.2 Stipulations of Fact**

The parties have agreed to certain facts ~~[to be placed in evidence as Exhibit \_\_]~~ [that will be read to you]. You must therefore treat these facts as having been proved.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.4 Deposition and Prior Testimony in Lieu of Live Testimony**

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. ~~[~~When a person is unavailable to testify at trial, the deposition of that person may be used at the trial~~]~~.

~~The deposition of [name of witness] was taken on [date]. Insofar as possible, you should consider deposition testimony.~~ You heard the deposition testimony of numerous witnesses. [You also heard testimony given in the SHST litigation from witnesses who were placed under oath to tell the truth, where the questions and answers were recorded.] Insofar as possible, you should consider the deposition [and other prior sworn testimony] that was presented to you in court in lieu of live testimony, in the same way as if the witness had been present to testify.

~~[Do]~~ Most of the prior testimony you heard was presented by video, but some was presented by counsel reading from a written transcript. For testimony that was read to you, do not place any significance on the behavior or tone of voice of any person reading the questions or answers~~]~~.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.11 Use of Interrogatories**

Evidence ~~[will now be]~~ [was] presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath before the trial in response to questions that were submitted under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.12 Use of Requests for Admission**

Evidence ~~[will now be]~~ [was] presented to you in the form of admissions to the truth of certain facts. These admissions were given in writing before the trial, in response to requests that were submitted under established court procedures. You must treat these facts as having been proved.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.13 Expert Opinion**

You ~~[have heard]~~~~[are about to hear]~~ testimony from [~~name~~ Alberto Menache, Phillip Fier, Angela Tinwell, Darren Hendler, Kristie Kershaw, Stephen Lane, Robin Russell, and Robert Wunderlich] who ~~[testified]~~~~[will testify]~~ about ~~[his]~~~~[her]~~their opinions and the reasons for those opinions. This opinion testimony ~~is~~was allowed, because of the ~~specialized knowledge, skill, education or~~ experience, ~~training, or education~~ of ~~this witness~~those witnesses.

Such opinion testimony should be judged like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness's specialized knowledge, skill, experience, training, or education, the reasons given for the opinion, and all the other evidence in the case.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).



**UNDISPUTED: 2.14 Charts and Summaries Not Received in Evidence**

Certain charts and summaries not admitted into evidence ~~may be~~ ~~have been~~ shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.15 Charts and Summaries Received in Evidence**

Certain charts and summaries ~~[may be]~~ ~~[have been]~~ admitted into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the testimony or other admitted evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 2.16 Evidence in Electronic Format**

Those exhibits received in evidence that are capable of being displayed electronically will be provided to you in that form, and you will be able to view them in the jury room. A computer, projector, printer, and accessory equipment will be available to you in the jury room.

A court technician will show you how to operate the computer and other equipment; how to locate and view the exhibits on the computer; and how to print the exhibits. You will also be provided with a paper list of all exhibits received in evidence. You may request a paper copy of any exhibit received in evidence by sending a note through the ~~[clerk]~~ ~~[bailiff]~~ courtroom deputy. If you need additional equipment or supplies or if you have questions about how to operate the computer or other equipment, you may send a note to the ~~[clerk]~~ ~~[bailiff]~~ courtroom deputy, signed by your foreperson or by one or more members of the jury. Do not refer to or discuss any exhibit you were attempting to view.

If a technical problem or question requires hands-on maintenance or instruction, a court technician may enter the jury room with ~~[the clerk]~~ ~~[the bailiff]~~ courtroom deputy present for the sole purpose of assuring that the only matter that is discussed is the technical problem. When the court technician or any nonjuror is in the jury room, the jury shall not deliberate. No juror may say anything to the court technician or any nonjuror other than to describe the technical problem or to seek information about operation of the equipment. Do not discuss any exhibit or any aspect of the case.

The sole purpose of providing the computer in the jury room is to enable jurors to view the exhibits received in evidence in this case. You may not use the computer for any other purpose. At my direction, technicians have taken steps to ensure that the computer does not permit access to the Internet or to any “outside” website, database, directory, game, or other material. Do not attempt to alter the computer to obtain access to such materials. If you discover that the computer provides or allows access to such materials, you must inform the court immediately and refrain from viewing such materials. Do not remove the computer or any electronic data [disk] from the jury room, and do not copy any such data.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023) (bracketed text left if applicable option).

**DISPUTED: SPECIAL INSTRUCTION 1 – STIPULATED FACTS**

**1. DISPUTED PROPOSED INSTRUCTIONS**

**A. PLAINTIFFS’ PROPOSED INSTRUCTION:**

The parties have stipulated, and you are instructed, that:

1. Plaintiff Rearden, LLC developed the MOVA Contour software, which is part of a facial performance capture system called Contour Reality Capture. Prior to August 17, 2012, MOVA Contour was owned by Rearden’s wholly owned subsidiaries.
2. On August 17, 2012, ownership of all of the MOVA Contour assets, including the MOVA Contour software, and the copyright in that software transferred to a company called OL2, Inc. Plaintiffs Rearden LLC and Rearden Mova LLC have never had an ownership interest in OL2, Inc.
3. On February 11, 2013, OL2, Inc. transferred all of the MOVA Contour assets to a company called MO2, LLC. As the result of that transfer, the copyright in the MOVA Contour software became the property of MO2, LLC.
4. Digital Domain 3.0, Inc. (“DD3”) is a visual-effects company and is not a party to this case. DD3 made copies of the MOVA Contour software into the random access memory of computers DD3 operated while working on Defendant’s 2017 live-action movie *Beauty and the Beast*.
5. Defendant’s live-action movie *Beauty and the Beast* was released to theaters on March 17, 2017.

**AUTHORITY:** Stipulation by the parties, with the exception of disputed language referring to “copies of the MOVA Contour software.”

**B. DEFENDANT’S PROPOSED INSTRUCTION:**

The parties have stipulated, and you are instructed, that:

1. Plaintiff Rearden, LLC developed the MOVA Contour software, which is part of a facial performance capture system called Contour Reality Capture. Prior to August 17, 2012, MOVA Contour was owned by Rearden’s wholly owned subsidiaries.
2. On August 17, 2012, ownership of all of the MOVA Contour assets, including the MOVA Contour software and the copyright in that software, transferred to a company called OL2, Inc. Plaintiffs Rearden LLC and Rearden Mova LLC have never had an ownership interest in OL2, Inc.
3. On February 11, 2013, OL2, Inc. transferred all of the MOVA Contour assets to a company called MO2, LLC. As the result of that transfer, the copyright in the MOVA Contour software became the property of MO2, LLC.
4. Digital Domain 3.0, Inc. (“DD3”) is a visual-effects company and is not a party to this case. DD3 made copies of code from the MOVA Contour software into the random access memory of computers DD3 operated while working on Defendant’s 2017 live-action movie *Beauty and the Beast*.
- ~~4.~~5. Defendant’s live-action movie *Beauty and the Beast* was released to theaters on March 17, 2017.

**2. PARTIES’ POSITION STATEMENTS****A. PLAINTIFFS’ POSITION**

The only dispute regarding this instruction is whether, as with other instructions, it should refer to DD3 making “copies of the MOVA Contour software,” or “copies of code from the MOVA Contour software.” *See* ¶ 4. Rearden will not repeat its arguments here, but refers back to its position statement regarding Disputed Instruction 1.5 in the Preliminary Instructions.

**B. DEFENDANT’S POSITION**

The parties agree to all of the stipulated facts set forth above, except with respect to No. 4, where they disagree as to whether the words “code from” should be included in the sentence “DD3 made copies of [code from] the MOVA Contour software into the random access memory of computers DD3 operated while working on Defendant’s 2017 live-action movie *Beauty and the Beast*.”

The parties therefore only dispute how to refer to DD3’s copying. Neither party disputes the fact of copying or how it was done. *See, e.g.*, Special Instruction 1 – Stipulated Facts at ¶ 4. The dispute is over whether to say, as Defendant proposes, DD3 copied “code from” the MOVA Contour software, or whether to say DD3 copied “the MOVA Contour software” without referring to “the code from” that software, as Plaintiffs propose. The Court should adopt Defendant’s proposal because the copyrighted work at issue in this case is the code; that is what was deposited with the Copyright Office and what has copyright protection. Copyright protection does not extend beyond the code itself to the functionality of the software, and Rearden has no copyright-protected interest in the outputs of the software. Yet vaguely informing the jury that the “software” was copied could lead the jury to conclude that copyright protection extends further than it actually does. Precision is essential to ensure that the jury understands exactly what the infringing act is alleged to be so that they can accurately evaluate whether Defendant had the legal right and practical ability to control the alleged infringement, and the extent to which Defendant profited (if at all) from the alleged infringement.

Plaintiffs disagreed with including a reference to the code on the parties’ most recent meet and confer conference because they claimed to be concerned that Defendant will argue that less than all of the code was copied and Plaintiffs will therefore have to address substantiality of copying and other issues. This does not make sense. The parties have stipulated to copying and deleted that issue from the proposed jury instructions. *See, e.g.*, 17.1 (neither party included “Proof of Copying” in model instruction); 17.5 (both parties’ proposals include stipulation on copying and delete requirement for Plaintiffs to show copying of original expression from copyrighted work). Plaintiffs

1 also argued in the prior jury instructions filing that “DD3 was not simply copying the ‘code’ from the  
2 MOVA Contour software; it was copying the entire software.” Dkt. 552 at 12. This underscores  
3 Defendant’s concern about juror confusion. Rearden has claimed that the “entire software” includes  
4 Maya Scripts—but evidence of Maya Scripts has been excluded. Dkt. 483.



**DISPUTED: 17.1 Preliminary Instruction—Copyright****1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

The plaintiff, ~~[name of plaintiff]~~, Rearden, claims ownership of a copyright and seeks damages against the defendant, ~~[name of defendant]~~, Disney, for vicarious copyright infringement. ~~The defendant~~ Disney denies infringing ~~the any~~ copyright owned by Rearden ~~[and] [contends that the copyright is invalid] [asserts an affirmative defense, e.g., that it made a fair use of the work].~~ To help you understand the evidence in this case, I will explain some of the legal terms you will hear during this trial.

**DEFINITION OF COPYRIGHT**

The owner of a copyright has the right to exclude any other person from reproducing, distributing, performing, displaying, or preparing derivative works from the work covered by copyright for a specific period of time.

A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, or computer program.

Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries cannot themselves be copyrighted.

The copyrighted work must be original. An original work that closely resembles other works can be copyrighted so long as the similarity between the two works is not the result of copying.

**~~{~~COPYRIGHT INTERESTS~~}~~**

The copyright owner may ~~[transfer] [sell] [convey]~~ to another person all or part of the owner's property interest in the copyright, that is, the right to exclude others from reproducing, distributing, performing, displaying or preparing derivative works from the copyrighted work. ~~To be valid, t~~ The ~~[transfer] [sale] [conveyance]~~ must be in writing and signed by the transferor. The person to whom a right is transferred is called an assignee. ~~or~~

~~[The copyright owner may agree to let another person exclusively reproduce, distribute, perform, display, use, or prepare a derivative work from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the transferor. The person to whom this right is transferred is called an exclusive licensee. The exclusive licensee has the right to exclude others from [describe the rights granted in the license].]~~

### **~~{~~HOW COPYRIGHT IS OBTAINED~~}~~**

Copyright automatically attaches to a work the moment the work is fixed in any tangible medium of expression. The owner of the copyright may apply to register the copyright by completing a registration form and depositing a copy of the copyrighted work with the Copyright Office. After determining that the material deposited constitutes copyrightable subject matter and that certain legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.}]

### **PLAINTIFF'S BURDEN OF PROOF**

In this case, the plaintiff, ~~[name of plaintiff]~~ Rearden, contends that the defendant, ~~[name of defendant]~~, has infringed Disney, is liable for the alleged vicarious infringement of the plaintiff's copyright. ~~The plaintiff~~ Rearden has the burden of proving by a preponderance of the evidence that ~~the plaintiff~~ Rearden is the owner of the copyright in the MOVA Contour software and, if so, that ~~the defendant copied original expression~~ Disney is vicariously liable for DD3's unauthorized copying of from the copyrighted work. MOVA Contour software while working on Beauty and the Beast. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that ~~the copyrighted work was infringed~~ Rearden is the owner of the copyright in the MOVA Contour software, and that Disney is liable for vicarious infringement.

~~[The plaintiff must also prove that the defendant's use of the copyrighted work was substantial. In determining whether the defendant's use of the copyrighted work was substantial, you may consider how important the copied portion was to the copyrighted work as a whole.]~~

### **PROOF OF COPYING**

To prove that the defendant copied the plaintiff's work, the plaintiff may show that the defendant had access to the plaintiff's copyrighted work and that there are substantial similarities between the defendant's work and the plaintiff's copyrighted work.

#### LIABILITY FOR INFRINGEMENT

One who ~~[reproduces] [publicly distributes] [publicly performs] [publicly displays] [prepares derivative works from]~~ a copyrighted work without authority from the copyright owner during the term of the copyright infringes the copyright. Anyone who copies original expression from a copyrighted work during the term of the copyright without the owner's permission infringes the copyright. The parties have stipulated, and you are instructed, that DD3 copied original expression from the MOVA Contour software by copying the MOVA Contour software into the random access memory of computers that DD3 operated while working on *Beauty and the Beast*. The parties dispute whether Rearden owned the copyright in the MOVA Contour software at the time DD3 copied this code and thus, whether DD3 infringed copyright while working on *Beauty and the Beast*.

[Copyright may also be infringed by [vicariously infringing] ~~[and contributorily infringing]~~.]

#### ~~{VICARIOUS INFRINGEMENT}~~

A person is liable for copyright infringement by another if the person has profited directly from the infringing activity and had the right and ability to supervise or control the infringing activity, whether or not the person knew of the infringement. ~~]~~

#### ~~{CONTRIBUTORY INFRINGEMENT}~~

~~[A person is liable for copyright infringement by another if the person knows or should have known of the infringing activity and [induces ] [or ] [materially contributes to] the activity.]~~

#### ~~{DEFENSES TO INFRINGEMENT}~~

~~[The defendant contends that there is no copyright infringement. There is no copyright infringement when [the defendant independently created the challenged work] [the defendant made fair use of the copyrighted work by reproducing copies for purposes such as criticism, comment,~~

~~news reporting, teaching, scholarship, or research] [the plaintiff abandoned ownership of the copyrighted work] [the plaintiff misused the copyright by requiring its exclusive use or preventing the development of competing products] [the plaintiff granted the defendant an express license to [use] [copy] [other] the plaintiff's copyrighted work] [the plaintiff granted the defendant an implied license to use the plaintiff's copyrighted work] [the defendant, as an owner of a copy of the plaintiff's copyrighted work, resold that copy after the plaintiff made the first sale].]~~

**AUTHORITY:** Ninth Circuit Model Jury Instruction 17.1 (altered to select appropriate text from bracketed options based on the claims and defenses in this case, identify the parties, describe the claims and issues, and otherwise conform the instruction to the facts and issues).

#### **B. DEFENDANT'S PROPOSED INSTRUCTION:**

The plaintiff, ~~[name of plaintiff]~~, Rearden, claims ownership of a copyright ~~and in the MOVA Contour software. Rearden~~ seeks damages against the defendant, ~~[name of defendant]~~, Disney, for vicarious copyright infringement. ~~— based on non-party DD3's copying of code from the MOVA Contour software while working on *Beauty and the Beast*.~~

The defendant, Disney, denies infringing any the copyright owned by Rearden. ~~[and] [contends that the copyright is invalid] [asserts an affirmative defense, e.g., that it made a fair use of the work]. To help you understand the evidence in this case,~~

I will ~~explain some of the legal terms you will hear during this trial.~~ now instruct you on the law regarding copyright infringement.

#### **DEFINITION OF COPYRIGHT**

~~The owner of copyright has the right to exclude any other person from reproducing, distributing, performing, displaying, or preparing derivative works from the work covered by for a specific period of time.~~

~~A copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, motion picture, audiovisual work, sound recording, architectural work, or computer program.~~

~~Facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries cannot themselves be copyrighted.~~

~~The copyrighted work must be original. An original work that closely resembles other works can be copyrighted so long as the similarity between the two works is not the result of copying.~~

### ~~{COPYRIGHT INTERESTS}~~

~~{The copyright owner may [transfer] [sell] [convey] to another person all or part of the owner's property interest in the copyright, that is, the right to exclude others from reproducing, distributing, performing, displaying or preparing derivative works from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in writing and signed by the transferor. The person to whom a right is transferred is called an assignee.}~~

~~or~~

~~{The copyright owner may agree to let another person exclusively reproduce, distribute, perform, display, use, or prepare a derivative work from the copyrighted work. To be valid, the [transfer] [sale] [conveyance] must be in and signed by the transferor. The person to whom this right is transferred is called an exclusive licensee. The exclusive licensee has the right to exclude others from [describe the rights granted in the license].}~~

### ~~{HOW COPYRIGHT IS OBTAINED}~~

~~{Copyright automatically attaches to a work the moment the work is fixed in any tangible medium of expression. The owner of the copyright may apply to register the copyright by completing a registration form and depositing a copy of the copyrighted work with the Copyright Office. After determining that the material deposited constitutes copyrightable subject matter~~

and that certain legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.]

### **~~PLAINTIFF'S BURDEN OF PROOF~~**

In this case, the plaintiff, ~~[name of plaintiff]~~, contends that the defendant, ~~[name of defendant]~~, has infringed the plaintiff's copyright. The plaintiff has the burden of proving by a preponderance of the evidence that the plaintiff is the owner of the copyright and that the defendant copied original expression from the copyrighted work. Preponderance of the evidence means that you must be persuaded by the evidence that it is more probably true than not true that the copyrighted work was infringed.

[The plaintiff must also prove that the defendant's use of the copyrighted work was substantial. In determining whether the defendant's use of the copyrighted work was substantial, you may consider how important the copied portion was to the copyrighted work as a whole.]

### **~~PROOF OF COPYING~~**

To prove that the defendant copied the plaintiff's work, the plaintiff may show that the defendant had access to the plaintiff's copyrighted work and that there are substantial similarities between the defendant's work and the plaintiff's copyrighted work.

### **~~LIABILITY FOR INFRINGEMENT~~**

One who [reproduces] [publicly distributes] [publicly performs] [publicly displays] [prepares derivative works from] a copyrighted work without authority from the copyright owner during the term of the copyright infringes the copyright.

[Copyright may also be infringed by [vicariously infringing] [contributorily infringing].]

### **~~[VICARIOUS INFRINGEMENT]~~**

~~[A person is liable for copyright infringement by another if the person has profited directly from the infringing activity and had the right and ability to supervise or control the infringing activity, whether or not the person knew of the infringement.]~~

~~**{CONTRIBUTORY INFRINGEMENT}**~~

~~[A person is liable for copyright infringement by another if the person knows or should have known of the infringing activity and [induces] [or] [materially contributes to] the activity.]~~

~~**{DEFENSES TO INFRINGEMENT}**~~

~~[The defendant contends that there is no copyright infringement. There is no copyright infringement when [the defendant independently created the challenged work] [the defendant made fair use of the copyrighted work by reproducing copies for purposes such as criticism, comment, news reporting, teaching, scholarship, or research] [the plaintiff abandoned ownership of the copyrighted work] [the plaintiff misused the copyright by requiring its exclusive use or preventing the development of competing products] [the plaintiff granted the defendant an express license to [use] [copy] [*other*] the plaintiff's copyrighted work] [the plaintiff granted the defendant an implied license to use the plaintiff's copyrighted work] [the defendant, as an owner of a copy of the plaintiff's copyrighted work, resold that copy after the plaintiff made the first sale].]~~

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

## 2. PARTIES' POSITION STATEMENTS

### A. PLAINTIFFS' POSITION

Rearden's proposed Instruction 17.1 for the jury's Final Instructions is the same as its proposal for the Preliminary Instructions (thus, to the extent the disputes over the Preliminary Instruction remain relevant, Rearden refers back to its Preliminary Instruction 17.1 position statement rather than repeating its arguments here). Disney's proposal, by contrast, is a severely truncated version that would contain just two sentences describing the parties' claims and defenses.

Rearden contends that Instruction 17.1 should be given as part of the Preliminary Instructions to the jury before trial, and again before the jury begins its deliberations. The parties largely agreed (with two relatively minor exceptions discussed supra) on Instruction 17.1 for use as a preliminary instruction – it is drawn directly from the Model Instructions, with minimal changes necessary to customize the instruction to the facts of the case. So there is no question that it contains an accurate statement of the law and that it is useful to the jury.

Plaintiffs believe that repeating the instruction before deliberations begin will assist the jury in understanding the more specific instructions that follow for several reasons. First, Instruction 17.1 provides a simple and easy-to-understand overview of the copyright claims at issue in a single instruction – it will provide a useful review of copyright concepts after the jury has heard the evidence and arguments of the parties that will better enable the jury to understand the specific instructions on individual elements within the context of what it has heard. Instruction 17.1 provides a useful and easy to understand framework for understanding the claims and issues in the case that render the later instructions easier to access for people confronting these concepts for the first time. Second, there is little reason to expect that the jury will remember the preliminary instructions with any level of precision after two weeks have elapsed. The jury will have received its preliminary instructions before it has heard any evidence or argument in the case, and for many if not all of them, this will be their first exposure to issues relating to copyright law and copyright infringement. It is highly unlikely that they will have fully absorbed the preliminary instruction version of 17.1 without any context or experience to guide them. Third, the jury will not receive written copies of their



preliminary instructions – thus, the useful overview provided by Instruction 17.1 will not be available to the jury during its deliberations unless it is included in the final instructions. Fourth and finally, many other instructions will be included in both the preliminary and final instructions: the parties agree that Instructions 1.3 (and 1.4, its essentially identical counterpart), 1.5 (which describes the parties’ claims and defenses), 1.6, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, and 1.20 should all be given as preliminary and final instructions. And the reason for this is clear: it is unreasonable to expect the jury to retain all of the information in the preliminary instructions after two weeks and hours of evidence and argument. Important concepts bear repeating, and it helps the jury to have written instructions it may refer to in its deliberations. Giving Instruction 17.1 as part of the final instructions is not a waste of time, as Disney claims. Rather, it is a useful and brief overview that will help ensure the jury can fully understand and follow the Court’s instructions.

## **B. DEFENDANT’S POSITION**

Plaintiffs’ proposal to repeat this entire *preliminary* instruction once again to the jury at the end of trial is unnecessarily repetitive for the jurors. This is not a long trial, and there are specific instructions for the relevant issues the jury needs to decide. Defendant’s proposal instead offers a streamline prefatory statement to orient the jurors to those specific instructions.

If the Court is inclined to include a full preliminary instruction again, Defendant proposes that the instruction be given as Defendant proposed in the preliminary set of instructions and provides the support for in instruction in the alternative:

Defendant proposes the addition of “legal” before “right” and “practical” before “ability” in the section on “Vicarious Infringement,” consistent with Ninth Circuit case law and this Court’s Order on Defendant’s motion for summary judgment, all of which contain this exact language. *See Williams v. Gaye*, 895 F.3d 1106, 1132 (9th Cir. 2018) (“A vicarious infringer ‘exercises control over a direct infringer when he has both a *legal right* to stop or limit the directly infringing conduct, as well as the *practical ability* to do so.’”) (emphasis added) (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007); Dkt. 555 at 9 (Court’s summary judgment

Order quoting the same language from *Williams* and holding that “there is a genuine issue of material fact as to whether Disney had the *practical* ability to stop or limit the infringing conduct ...”) (emphasis added). The Court should adopt Defendant’s proposal because it is the correct statement of the legal standard and will help the jury understand their charge. Where, as here, the model instruction “does not accurately track” the controlling law, the Court should conform the model to the governing legal standard. *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 869 (9th Cir. 2020) (“[B]ecause th[e] instruction [given by the district court and derived from the Ninth Circuit Model] does not accurately track our functionality caselaw, its use was error and we must reverse.”) (citation omitted). The Comment to Model Instruction 17.20 specifically contemplates that in “certain cases, it may be appropriate to instruct the jury on the meaning of ‘right and ability to supervise or control.’” Ninth Circuit Manual of Model Civil Jury Instructions at 445. It would be appropriate to do so here, as without some further explication, a lay jury unfamiliar with the application of the legal standard is likely to be confused.

Defendant’s proposal is a modest, two-word adjustment to the model instruction to achieve the exact purpose contemplated by the Ninth Circuit’s comment and to ensure the instructions are consistent with the case law that the Court and all of the parties have applied to this case. Using the same words the Ninth Circuit did—“legal” and “practical”—clarifies what for lay jurors are not self-evident concepts. Modifying “right” with “legal” makes it clear to jurors that the defendant must have legal authority to take action, not a moral or amorphous right to do so. Likewise, modifying “ability” with “practical” makes it clear that the defendant must have the realistic, and not simply the theoretical, ability to supervise or control the infringement. The latter clarification is critical in this case. The Court’s summary judgment ruling concluded that a jury could, not that it must, find that the contract with DD3 gave Defendant the ability to stop DD3’s use of MOVA. The ruling finds it is a jury question whether Defendant had the *practical* ability to stop that use, in light of facts showing the difficulty of detecting the alleged infringement and policing hundreds of vendors and technologies that Defendant used to make a major motion picture.

1 Not only did the Court and Defendant cite and apply this standard in the summary judgment  
 2 Order and motion respectively, but Plaintiffs also did the same. *See, e.g.*, Dkt. 555 at 9-12 (Court’s  
 3 summary judgment order); Dkt. 451 at 9-17 (Plaintiffs’ summary judgment opposition); Dkt. 421 at  
 4 11-17 (Defendant’s motion for summary judgment). Plaintiffs quoted the exact same language from  
 5 *Williams* that the Court applied in its summary judgment Order and that Defendant proposes to add  
 6 to the model instruction here. *See* Dkt. 451 at 9.

7 At the parties’ most recent meet and confer conference, however, Plaintiffs reversed course  
 8 and claimed that the very standard they quoted in their summary judgment briefing did not actually  
 9 apply here. In particular, Plaintiffs claimed that the question of whether a defendant has the  
 10 “practical ability” to control the infringement applies only in the online context, where technical  
 11 constraints supposedly make it uniquely difficult to detect infringement. There is no authority for  
 12 Plaintiffs’ new position. No case that Defendant has seen states that only certain technical Internet  
 13 cases are subject to the “practical ability” standard. To the contrary, *Williams*—the Ninth Circuit  
 14 case on vicarious infringement that the Court cited in its summary judgment ruling—discusses the  
 15 “practical ability” to control the infringement, but it is not a case involving online infringement or  
 16 highly technical details; it was a standard copyright infringement case based on the music  
 17 composition copyright in the song *Got to Give It Up*. The same is true of the *scores* of other cases  
 18 that have stated the applicable standard as “legal right” and “practical ability” and that do not involve  
 19 infringement in the online context. *See, e.g., Range Road Music, Inc. v. East Coast Foods, Inc.*, 668  
 20 F.3d 1148, 1155 (9th Cir. 2012) (public performance of infringing musical works at restaurant and  
 21 lounge); *Liguori v. Hansen*, 752 F. App’x 389, 392 (9th Cir. 2018) (infringing logo on souvenir  
 22 book); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 389 (3d Cir. 2016) (copyrighted photos  
 23 infringingly reproduced, publicly displayed, and distributed on magazines, merchandise, motion  
 24 pictures, and other locations); *Kevin Barry Fine Art Assocs. v. Ken Gangbar Studio, Inc.*, 391 F.  
 25 Supp. 3d 959, 968-69 (N.D. Cal. 2019) (reproduction of infringing sculptural works for use in  
 26 restaurant); *Oregon Catholic Press v. Ambrosetti*, 218 F. Supp. 3d 1158, 1165 (D. Or. 2016)  
 27 (reproduction and distribution of musical works in church hymnals); *Adobe Sys. Inc. v. Canus*  
 28

1 *Prods., Inc.*, 173 F. Supp. 2d 1044, 1053-55 (C.D. Cal. 2001) (sale of infringing software at  
 2 computer fairs); *Rams v. Def Jam Recordings, Inc.*, 202 F. Supp. 3d 376, 385 (S.D.N.Y. 2016)  
 3 (copyrighted image used as infringing album cover art); *Payne v. Manilow*, 2019 WL 4149357, at \*2  
 4 (C.D. Cal. July 11, 2019) (infringing public displays at concerts and award shows of copyrighted  
 5 motion picture); *Kilina Am., Inc. v. Bonded Apparel, Inc.*, 2019 WL 8065854, at \*2 (Nov. 19, 2019)  
 6 (alleged infringement of fabric design); *Broad. Music, Inc. v. Five Star Enters., LLC*, 2018 WL  
 7 4492481, at \*3 (D. Nev. Sept. 19, 2018) (infringing public performances of copyrighted music at  
 8 restaurant).

9       The requirement that the defendant must have the “practical ability” to control the  
 10 infringement is not limited to the online context—it is a fundamental element of vicarious liability  
 11 that applies in every case. *See, e.g., Paramount Pictures Corp. v. Int’l Media Films Inc.*, 2013 WL  
 12 3215189, at \*14 (C.D. Cal. June 12, 2013) (holding in case involving infringing distribution of  
 13 motion picture that “[t]he test for right or ability to supervise infringing requires both ‘a legal right to  
 14 stop or limit the directly infringing conduct ... [and] the practical ability to do so.’”) (internal  
 15 alterations in original) (citation omitted); *Kevin Barry Fine Art Assocs.*, 391 F. Supp. 3d at 968-69  
 16 (“As to vicarious liability, one is liable ‘[1] by profiting from direct infringement while [2] declining  
 17 to exercise a right to stop or limit it.’ [citations] The second prong, which the Ninth Circuit refers to  
 18 as the ‘control’ element, requires that the defendant ‘ha[d] both a legal right to stop or limit the  
 19 directly infringing conduct, as well as the practical ability to do so.’”) (citations omitted); *Kilina Am.,*  
 20 *Inc. v. SA & PW, Inc.*, 2019 WL 8685066, at \*2 (C.D. Cal. Aug. 27, 2019) (“Any pressure that  
 21 [alleged vicarious infringer] could feasibly put on [direct infringer] falls far short of the “legal right”  
 22 and “practical ability” to control necessary to impose vicarious liability.”).

23       It is critical for the jury to understand that a copyright defendant’s liability for someone else’s  
 24 conduct cannot be imposed just because in some remote or theoretical but completely impractical  
 25 sense the defendant may have the ability to control the infringement. *See, e.g., Millennium Funding,*  
 26 *Inc. v. 1701 Mgmt. LLC*, 576 F. Supp. 3d 1192, 1215 (S.D. Fla. 2021) (“[T]he plaintiff must allege  
 27 that the defendant has a ‘practical ability to police the infringing activities of [third parties] as  
 28

1 opposed to suggesting measures that are imprecise, overbroad or not workable.”) (citation omitted);  
2 *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174 (9th Cir. 2007) (similar). The  
3 concept of vicarious liability is not that expansive. As case after case has affirmed, the standard  
4 requires that the defendant have the *practical* ability to actually do something about the  
5 infringement. The jury should be so instructed.

6 In the parties’ most recent meet and confer, Plaintiffs also claimed that adding the word  
7 “legal” before “right” would confuse the jury and lead them to believe that they are being asked to  
8 draw a legal conclusion. That does not make sense. As discussed, “legal right” will help the jury  
9 understand that they must do more than evaluate whether this is morally “right” or just.

10 Because Defendant’s proposal accurately reflects current Ninth Circuit law and will assist the  
11 jury with understanding the standard, the Court should adopt Defendant’s proposal.

12 Further, including the full optional model section “How Copyright Is Obtained,” as Rearden  
13 proposes, is confusing, misleading, and could cause the jury to err because the model language  
14 assumes ownership when that issue is disputed in this case. Instructing the jury that “[t]he **owner** of  
15 the copyright may apply to register the copyright ...” and that the Register of Copyright “issues a  
16 certificate of registration to the copyright **owner**” is incorrect and highly prejudicial, because it is for  
17 the jury to decide whether Rearden was the owner when it registered the copyright in 2016 and  
18 received the certificate. This is optional text in the model instruction, so there is no reason to include  
19 it when inapplicable and erroneous in this case. The jury will be separately instructed on copyright  
20 registration in 17.7, so there is no prejudice to Plaintiffs in removing this section from this  
21 preliminary instruction. Plaintiffs asserted during meet and confer that they included this instruction  
22 because it is important for the jury to understand that a work can be registered after the copyright  
23 attaches to it. Defendant’s proposed instruction accomplishes this without the confusing and  
24 misleading language Plaintiffs propose keeping, because Defendant’s proposal just keeps the first  
25 sentence of this optional section, which addresses Plaintiffs’ stated issue.

26 Lastly, the parties dispute how to refer to DD3’s copying. Neither party disputes the fact of  
27 copying or how it was done. *See, e.g.*, Special Instruction 1 – Stipulated Facts at ¶ 4. The dispute is  
28

1 over whether to say, as Defendant proposes, DD3 copied “code from” the MOVA Contour software,  
2 or whether to say DD3 copied “the MOVA Contour software” without referring to “the code from”  
3 that software, as Plaintiffs propose. The Court should adopt Defendant’s proposal because the  
4 copyrighted work at issue in this case is the code; that is what was deposited with the Copyright  
5 Office and what has copyright protection. Copyright protection does not extend beyond the code  
6 itself to the functionality of the software, and Rearden has no copyright-protected interest in the  
7 outputs of the software. Yet vaguely informing the jury that the “software” was copied could lead the  
8 jury to conclude that copyright protection extends further than it actually does. Precision is essential  
9 to ensure that the jury understands exactly what the infringing act is alleged to be so that they can  
10 accurately evaluate whether Defendant had the legal right and practical ability to control the alleged  
11 infringement, and the extent to which Defendant profited (if at all) from the alleged infringement.

12 Plaintiffs disagreed with including a reference to the code on the parties’ most recent meet  
13 and confer conference because they claimed to be concerned that Defendant will argue that less than  
14 all of the code was copied and Plaintiffs will therefore have to address substantiality of copying and  
15 other issues. This does not make sense. The parties have stipulated to copying and deleted that issue  
16 from the proposed jury instructions. *See, e.g.*, 17.1 (neither party included “Proof of Copying” in  
17 model instruction); 17.5 (both parties’ proposals include stipulation on copying and delete  
18 requirement for Plaintiffs to show copying of original expression from copyrighted work). Plaintiffs  
19 also argued in the prior jury instructions filing that “DD3 was not simply copying the ‘code’ from the  
20 MOVA Contour software; it was copying the entire software.” Dkt. 552 at 12. This underscores  
21 Defendant’s concern about juror confusion. Rearden has claimed that the “entire software” includes  
22 Maya Scripts—but evidence of Maya Scripts has been excluded. Dkt. 483.

**UNDISPUTED: 17.2 Copyright—Defined (17 U.S.C. § 106)**

Copyright is the exclusive right to copy. This right to copy includes the exclusive right[s] to  
[, or authorize others to]:

[1.]—[reproduce the copyrighted work in [copies][phonorecords];]

[2.]—[[recreate, transform, or adapt the work, that is] prepare derivative works based upon  
the copyrighted work;]

[3.]—[distribute [copies][phonorecords] of the copyrighted work to the public by [sale  
or other transfer of ownership] [or by] [rental or lease or lending];]

[4.]—[perform publicly a copyrighted [literary work][musical work][dramatic work]  
[choreographic work][pantomime work][motion picture] [or] [*specify other  
audiovisual work*];]

[5.]—[display publicly a copyrighted [literary work][musical work][dramatic work]  
[choreographic work][pantomime work][pictorial work][graphic work]  
[sculptural work][individual image of a motion picture] [or] [*specify other  
audiovisual work*]; and]

[6.]—[perform a sound recording by means of digital audio transmission].

It is the owner of a copyright who may exercise [this][these] exclusive right[s]. The term  
“owner” includes [the author of the work][an valid assignee][an exclusive licensee]. In general,  
copyright law protects against [reproduction][adaptation][public distribution][public  
performance][public display] of identical or substantially similar copies of the owner’s copyrighted  
work without the owner’s permission. An owner may enforce the[se] right[s] to exclude others in an  
action for copyright infringement.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May  
2023).



**UNDISPUTED: 17.3 Copyright—Subject Matter—Generally (17 U.S.C. § 102)**

The work[s] ~~identify the works at issue~~ involved in this trial is called the MOVA Contour software. Software is a ~~are known as:~~

~~[1.]—[literary works [in which words, numbers, or other verbal or numerical symbols are expressed];]~~

~~[2.]—[musical works, including any accompanying words;] [3.]—[dramatic works, including any accompanying music;] [4.]—[pantomimes;]~~

~~[5.]—[choreographic works;]~~

~~[6.]—[pictorial works] [graphic works] [sculptural works] [;] [, such as two and three dimensional works of fine, graphic or applied art, photographs, prints, and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans;]~~

~~[7.]—[motion pictures] [and other audiovisual works] [in which a series of related images convey an impression of motion when shown in succession];]~~

~~[8.]—[sound recordings] [;] [, which are works that result from fixation of a series of musical, spoken, or other sounds;]~~

~~[9.]—[architectural works] [;] [, which are building designs as embodied in buildings, architectural plans, drawings, or other modes of expression;]~~

~~[10.]—[computer programs] [that is, sets~~ set ~~of statements or instructions to be used directly or indirectly in a computer to bring about a certain result].~~

You are instructed that a copyright may be obtained in ~~identify the work[s] at issue~~ the MOVA Contour software.

This work ~~[[This] [These] work[s]~~ can be protected by copyright law. Only that part of the work[s] consisting of original works of authorship ~~[fixed] [produced]~~ in any tangible ~~[medium]~~ ~~[form]~~ of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, is protected by the Copyright Act-~~].~~



1           ~~[Copyright protection for an original work of authorship does not extend to any [idea] [,~~  
2 ~~procedure] [, process] [, system] [, method of operation] [, concept] [, principle] [, or discovery],~~  
3 ~~regardless of the form in which it is described, explained, illustrated, or embodied.]~~

4           Copyright protection for the MOVA Contour software extends only to the software and not  
5 any other part of the MOVA Contour facial motion capture system.

6  
7 **AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May  
8 2023).

**DISPUTED: 17.5 Copyright Infringement—Elements—Ownership and Copying**  
**(17 U.S.C. § 501(a)–(b))**

**1. DISPUTED PROPOSED INSTRUCTIONS**

**A. PLAINTIFFS’ PROPOSED INSTRUCTION:**

Anyone who copies original expression from a copyrighted work during the term of the copyright without the owner’s permission infringes the copyright. The parties have stipulated, and you are instructed, that DD3 copied original expression from the MOVA Contour software by copying the MOVA Contour software into the random access memory of computers that DD3 operated while working on *Beauty and the Beast*.

~~On the plaintiff’s copyright infringement claim, the plaintiff~~ Rearden has the burden of proving by a preponderance of the evidence that:

~~1. the plaintiff~~ Rearden ~~was~~ is the owner of a valid copyright in the MOVA Contour software at the time DD3; ~~and~~

~~2. the defendant~~ copied the MOVA Contour software while working on *Beauty and the Beast* ~~original expression from the copyrighted work.~~

If you find that ~~the plaintiff~~ Rearden has ~~failed to meet this burden~~ proved both of these elements, your verdict as to copyright infringement should be for Disney ~~the plaintiff~~. If, ~~on the other hand,~~ you find that ~~the plaintiff~~ Rearden met this burden ~~has failed to prove either of these elements,~~ then for your verdict to be for Rearden on copyright infringement, you must also find that Rearden has proven that Disney ~~either vicariously or contributorily infringed, as described in Instruction 17.20 and 17.21~~ should be for the defendant.

**AUTHORITY:** Ninth Circuit Model Jury Instruction 17.5 (with alterations to customize the instruction to the facts and issues in the case and refer to the parties’ stipulation).

**B. DEFENDANT’S PROPOSED INSTRUCTION:**

Anyone who copies original expression from a copyrighted work during the term of the copyright without the owner’s permission infringes the copyright. The parties have stipulated, and you are instructed, that DD3 copied original expression from the MOVA Contour software by copying code from the MOVA Contour software into the random access memory of computers that DD3 operated while working on *Beauty and the Beast*.

~~On the plaintiff’s copyright infringement claim, the plaintiff~~ Rearden has the burden of proving by a preponderance of the evidence that:

~~1. the plaintiff~~ Rearden was ~~is~~ the owner of a valid copyright in the MOVA Contour software at the time DD3 ~~;~~ ~~and~~

~~2. the defendant~~ copied code from the MOVA Contour software while working on *Beauty and the Beast* ~~original expression from the copyrighted work.~~

If you find that ~~the plaintiff~~ Rearden has failed to meet this burden ~~proved both of these elements~~, your verdict as to copyright infringement should be for Disney ~~the plaintiff~~. If, ~~on the other hand~~, you find that ~~the plaintiff~~ Rearden met this burden ~~has failed to prove either of these elements, then for your verdict~~ to be for Rearden on copyright infringement, you must also find that Rearden has proven that Disney vicariously infringed, as described in Instruction 17.20 ~~should be for the defendant.~~

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**2. PARTIES’ POSITION STATEMENTS**

**A. PLAINTIFFS’ POSITION**

The only dispute regarding this instruction is whether, as with other instructions, the first paragraph of the instruction should refer to DD3 “copying the MOVA Contour software,” or “copying code from the MOVA Contour software.” Rearden will not repeat its arguments here, but

1 refers back to its position statement regarding Disputed Instruction 1.5 in the Preliminary  
2 Instructions.

### 3 4 **B. DEFENDANT’S POSITION**

5 The parties only dispute how to refer to DD3’s copying. Neither party disputes the fact of  
6 copying or how it was done. *See, e.g.*, Special Instruction 1 – Stipulated Facts at ¶ 4. The dispute is  
7 over whether to say, as Defendant proposes, DD3 copied “code from” the MOVA Contour software,  
8 or whether to say DD3 copied “the MOVA Contour software” without referring to “the code from”  
9 that software, as Plaintiffs propose. The Court should adopt Defendant’s proposal because the  
10 copyrighted work at issue in this case is the code; that is what was deposited with the Copyright  
11 Office and what has copyright protection. Copyright protection does not extend beyond the code  
12 itself to the functionality of the software, and Rearden has no copyright-protected interest in the  
13 outputs of the software. Yet vaguely informing the jury that the “software” was copied could lead the  
14 jury to conclude that copyright protection extends further than it actually does. Precision is essential  
15 to ensure that the jury understands exactly what the infringing act is alleged to be so that they can  
16 accurately evaluate whether Defendant had the legal right and practical ability to control the alleged  
17 infringement, and the extent to which Defendant profited (if at all) from the alleged infringement.

18 Plaintiffs disagreed with including a reference to the code on the parties’ most recent meet  
19 and confer conference because they claimed to be concerned that Defendant will argue that less than  
20 all of the code was copied and Plaintiffs will therefore have to address substantiality of copying and  
21 other issues. This does not make sense. The parties have stipulated to copying and deleted that issue  
22 from the proposed jury instructions. *See, e.g.*, 17.1 (neither party included “Proof of Copying” in  
23 model instruction); 17.5 (both parties’ proposals include stipulation on copying and delete  
24 requirement for Plaintiffs to show copying of original expression from copyrighted work). Plaintiffs  
25 also argued in the prior jury instructions filing that “DD3 was not simply copying the ‘code’ from the  
26 MOVA Contour software; it was copying the entire software.” Dkt. 552 at 12. This underscores  
27  
28

1 Defendant’s concern about juror confusion. Rearden has claimed that the “entire software” includes  
2 Maya Scripts—but evidence of Maya Scripts has been excluded. Dkt. 483.

**UNDISPUTED: 17.6 Copyright Infringement—Ownership of Valid Copyright—Definition**  
**(17 U.S.C. §§ 201–205)**

The plaintiff Rearden is the owner of a valid copyright in ~~identify work[s] allegedly~~  
~~infringed~~ the MOVA Contour software if ~~the plaintiff~~ Rearden proves by a preponderance of the  
evidence that:

- ~~1. the plaintiff's work is original; and~~
- ~~2. the plaintiff [is the author or creator of the work] [~~ Rearden received a transfer of ~~the~~  
~~copyright] [received a transfer of the right to [specify right transferred, e.g., make derivative~~  
~~works, publicly perform the work, etc.]]-ownership of the copyright in the MOVA Contour~~  
software.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May  
2023).

**DISPUTED: 17.12 Copyright Interests—Assignee**

(17 U.S.C. § 201(d)(1))

**1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

~~In this case, the [p]laintiff Rearden LLC [defendant] does not claim to be was the [author] [creator] [initial owner] of the copyright at issue in the MOVA Contour software. On August 17, 2012, ownership of the copyright in the MOVA Contour software was transferred from Rearden to non-party OL2, Inc. On February 11, 2013, OL2, Inc. transferred the copyright in the MOVA Contour software to MO2, LLC. Instead, the [p]laintiffs and [D]efendant disagree whether Plaintiffs own MO2 and the copyright in the MOVA Contour software. ~~claims that it received the copyright by virtue of assignment from the work's [author] [creator] [initial owner] so that the [plaintiff] [defendant] is now the assignee of the copyright.~~~~

A copyright owner may [transfer], [sell], or convey to another person all or part of the owner's property interest in the copyright; that is, the right to exclude others from copying the work. The person to whom the copyright is [transferred], [sold], or conveyed becomes the owner of the copyright in the work.

To be valid, the [transfer], [sale], or conveyance must be in a writing signed by the transferor. The person to whom this right is transferred is called an assignee. [The assignee may enforce this right to exclude others in an action for copyright infringement].

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**B. DEFENDANT'S PROPOSED INSTRUCTION:**

~~In this case, the [p]laintiff Rearden LLC [defendant] does not claim to be was the [author] [creator] [initial owner] of the copyright at issue in the MOVA Contour software. On August 17, 2012, ownership of the copyright in the MOVA Contour software was transferred from Rearden to~~

1 non-party OL2, Inc. On February 11, 2013, OL2, Inc. transferred the copyright in the MOVA  
 2 Contour software to MO2, LLC. ~~Instead, the [p]laintiffs and [D]efendant disagree whether~~  
 3 Plaintiffs have proven they own MO2 and the copyright in the MOVA Contour software. ~~claims that~~  
 4 ~~it received the copyright by virtue of assignment from the work's [author] [creator] [initial owner] so~~  
 5 ~~that the [plaintiff] [defendant] is now the assignee of the copyright.~~

6 A copyright owner may ~~[transfer]~~, ~~sell~~, or convey to another person all or part of the  
 7 owner's property interest in the copyright; that is, the right to exclude others from copying the work.  
 8 The person to whom the copyright is ~~[transferred]~~, ~~sold~~, or conveyed becomes the owner of the  
 9 copyright in the work.

10 To be valid, the ~~[transfer]~~, ~~sale~~, or conveyance must be in a writing signed by the  
 11 transferor. The person to whom this right is transferred is called an assignee. ~~[The assignee may~~  
 12 ~~enforce this right to exclude others in an action for copyright infringement.]~~

13  
 14 **AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May  
 15 2023).

## 16 17 **2. PARTIES' POSITION STATEMENTS**

### 18 **A. PLAINTIFFS' POSITION**

19 The parties initially submitted Instruction 17.12 as an agreed instruction. Rearden's proposed  
 20 instruction retains the language to which the parties initially agreed. It tracks the model instruction,  
 21 with modifications to conform the instruction to the facts of the case.

22 Disney now proposes to modify the instruction from the form initially agreed by the parties to  
 23 insert a reference to Rearden's burden of proof. Rearden objects to this change because the Model  
 24 Instruction does not include a reference to the burden of proof, and because importing the burden of  
 25 proof concept is unduly repetitive and over-emphasizes Disney's defense. Rearden's burden of proof  
 26 is adequately covered in other instructions: Instructions 1.5 (Preliminary and Final), 1.6 (Preliminary  
 27 and Final), 17.1 (Preliminary and Rearden's Proposed Final Instruction), 17.5 (Final), 17.6 (Final),  
 28



1 and 17.20 (Final) all reference Rearden's burden of proof. Disney's proposed addition of yet another  
2 reference to Rearden's burden of proof is unnecessary.

3 Instruction 17.12 is intended to instruct the jury regarding the law governing transfers of  
4 copyright interests. Rearden's proposed instruction, to which the parties initially agreed, adequately  
5 places the issue in context so the jury can understand how the determination of whether a valid  
6 transfer occurred fits into the parties' dispute. Adding that Disney disputes whether Rearden "has  
7 proven" it owns MO2 and the Copyright in the MOVA Contour software creates unnecessary  
8 surplusage – the jury has already been instructed (and reminded several times) that Rearden bears the  
9 burden of proof on the elements of its vicarious infringement claim.

#### 10 11 **B. DEFENDANT'S POSITION**

12 The parties' only dispute is over the inclusion of the words "have proven they" in the  
13 sentence "Plaintiffs and Defendant disagree whether Plaintiffs [have proven they] own MO2 and the  
14 copyright in the MOVA Contour software." Ownership is Plaintiffs' burden to prove, *see, e.g.*,  
15 Undisputed Instruction 17.6, and it is a point of dispute in this case. Defendant's proposed language  
16 is a simple and neutral way to instruct the jury on this dispute, consistent with Plaintiffs' burden of  
17 proof.

**DISPUTED: SPECIAL INSTRUCTION 2**

**1. DISPUTED PROPOSED INSTRUCTIONS**

**A. PLAINTIFFS' PROPOSED INSTRUCTION:**

**SPECIAL INSTRUCTION 2: AGENCY AND EMPLOYMENT DUTIES**

Rearden contends that Greg LaSalle was employed by Rearden as the General Manager of its MOVA Division when he formed MO2, LLC, and that as an employee of Rearden, LaSalle was also its agent for purposes of forming MO2, LLC. Disney denies that LaSalle was an employee of Rearden when he formed MO2, LLC, or that LaSalle was Rearden's agent for purposes of forming MO2, LLC.

An employee is an agent of their employer for matters within the scope of their employment. During the term of an employee's employment, the employer is entitled to a duty of undivided loyalty from the employee. All employees owe the duty of undivided loyalty, regardless of the level of their responsibility in the employer's business. The duty of undivided loyalty includes the duty not to obtain a material benefit from a third party in connection with the employee's use of their position.

If you find that LaSalle was an employee of Rearden acting within the scope of his employment when he formed MO2, LLC, then you should find that MO2, LLC belonged to Rearden.

**AUTHORITY:**

Employee Owes Duty of Loyalty to Employer: *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 414, 58 Cal. Rptr. 3d 527, 538 (2007) ("an employee, while employed, owes undivided loyalty to his employer"); *Blackbird Technologies, Inc. v. Joshi*, No. 5:15-CV-04272-EJD, 2015 WL 5818067, at \*4 (N.D. Cal. Oct. 6, 2015) ("During the term of employment, an employer is entitled to its employees' 'undivided loyalty'" (quoting *Fowler v. Varian Assocs.*, 196 Cal. App. 3d 34, 41 (1987))); *Zayo Grp. LLC v. Hisa*, No. SACV13752JSTJPRX, 2013 WL 12201401, at \*7 (C.D. Cal. Sept. 17, 2013) (same, and finding that this duty of loyalty extends to all employees regardless of the level of their responsibilities, citing *Huong, supra*); *Hanger Prosthetics & Orthotics, Inc. v. Capstone Orthopedic, Inc.*, 556 F. Supp. 2d 1122, 1142 (E.D. Cal. 2008) ("All employees owe a duty

of loyalty to their employers.” (citing *Otsuka v. Polo Ralph Lauren Corp.*, 2007 WL 3342721 (N.D.Cal.2007)).

Duty of Loyalty Extends to All Employees: *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 414, 58 Cal. Rptr. 3d 527, 538 (2007); *Zayo Grp. LLC v. Hisa*, No. SACV13752JSTJPRX, 2013 WL 12201401, at \*7.

Duty of Loyalty Prohibits Material Benefit from Employee’s Use of Position: *Erhart v. Boff Holding, Inc.*, 612 F. Supp. 3d 1062, 1121–22 (S.D. Cal. 2020) (quoting *Huong*, 150 Cal. App. 4th at 416, quoting in turn Restatement (Third) of Agency §§ 8.02, 8.04, 8.05(2)).

## **B. DEFENDANT’S PROPOSED INSTRUCTION:**

### **SPECIAL INSTRUCTION 2 – AGENCY**

Rearden contends that Greg LaSalle was acting as Rearden’s agent when he formed MO2, LLC.

Agency is a relationship that results when one person, the principal, indicates that another person is to act for the principal as to the subject matter of the agency, and the other person, the agent, agrees to act on the principal’s behalf and subject to the principal’s control. The agent acts for the principal when acting in the agreed-upon course and scope of the agency.

**AUTHORITY:** *Brown v. USA Taekwondo*, 40 Cal. App. 5th 1077, 1106 (2019); *Daniels v. Select Portfolio Servicing, Inc.*, 246 Cal. App. 4th 1150, 1178 (2016), *disapproved of on other grounds by Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th 905 (2022); *Castillo v. Glenair, Inc.*, 23 Cal. App. 5th 262, 277 (2018), *as modified on denial of reh’g* (May 14, 2018), *disapproved of on other grounds by Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313 (2022); Restatement (Third) of Agency, § 8.01 & comment (a).

1 **2. PARTIES' POSITION STATEMENTS**

2 **A. PLAINTIFFS' POSITION**

3 Rearden objects to Disney's Proposed Special Instruction because it misstates Rearden's  
 4 case, and is likely to confuse the jury. Rearden does not contend that it owns MO2 because LaSalle  
 5 was Rearden's agent apart from his duties to Rearden as its employee. It contends that LaSalle was a  
 6 Rearden and OnLive employee, whose scope and duties of employment as General Manager of the  
 7 MOVA Division and one of the highest paid employees in the company was governed by written  
 8 employment agreements. And as an employee, under California law LaSalle was subject to common  
 9 law fiduciary duties of loyalty. The jury should be properly instructed on both the nature of the  
 10 agency that is inherent in an employment relationship, and the duties an employee owes to his  
 11 employer in California. Those duties are directly relevant to the jury's determination of whether, in  
 12 forming MO2, LaSalle was acting on his own behalf and for his own sole benefit, or on behalf and  
 13 for the benefit of his employer Rearden. Part of that determination by the jury should be whether it  
 14 would be consistent with his legal duties for LaSalle, as an employee of Rearden, to form MO2 using  
 15 Rearden assets and resources for his own benefit. And the duty of undivided loyalty referenced in  
 16 Rearden's proposed instruction is clearly and unequivocally supported by the case law. The real  
 17 question is not whether Rearden's statement of the law is correct, but whether the jury can properly  
 18 assess LaSalle's actions as an employee without being informed about the duties he owed to  
 19 Rearden. Plaintiffs submit that it is imperative that the jury be instructed on that point.

20 Disney's proposed instruction is confusing and provides the jury with essentially no  
 21 guidance. First, as stated above, it is confusing because it misstates Rearden's claim: Rearden does  
 22 not merely contend that LaSalle was an agent apart from his employment, but rather that he was an  
 23 employee with all of the duties and obligations that entails. Moreover, Disney's instruction informs  
 24 the jury that a concept called "agency" exists, but gives them no tools for assessing 1) how that  
 25 relates to LaSalle's status as an employee of Rearden; 2) how to determine whether an agency  
 26 relationship exists, and what the scope of any such agency is; and 3) how that determination relates  
 27 to the facts of the case. Disney's instruction is essentially a *non sequitur*: it provides no useful  
 28

guidance for the jury, and can only serve to confuse them regarding what agency is and how it relates to the facts and issues in this case. Disney's instruction also misleadingly implies that the jury may find that LaSalle was acting within the scope of his employment in forming OL2, but that he was not an agent under the terms of Disney's instruction. Such a result is contrary to LaSalle's common law duties as an employee of Rearden. Two differing instructions on agency can only lead to juror confusion and may lead to an inconsistent verdict and error. The Court should adopt Rearden's proposed instruction.

### **B. DEFENDANT'S POSITION**

Defendant proposes this special instruction to instruct the jury on the relevant legal standard for agency in this case. Defendant's understanding is that Rearden contends that one of the reasons it owns the MOVA assets is that Greg LaSalle was acting as Rearden's agent when he formed MO2, LLC. If Rearden makes that argument to the jury, then the jury should be instructed on the law of agency and given a prefatory statement to help them understand why they are receiving the instruction.

Defendant's proposal is neutral. It provides a concise statement of the context that tells the jury why this instruction is being given. The statement of law is directly from applicable California precedent. *Brown v. USA Taekwondo* provides: "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." [Citation.] 'The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control.'" 40 Cal. App. 5th 1077, 1105 (2019) (citation omitted). Similarly, *Daniels* and *Castillo* explain that an agent is one who acts within the scope of the agency. *Daniels v. Select Portfolio Servicing, Inc.*, 246 Cal. App. 4th 1150, 1178 (2016) ("It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such ...") (citation omitted), *disapproved of on other grounds by Sheen v. Wells*

1 *Fargo Bank, N.A.*, 12 Cal. 5th 905 (2022); *Castillo v. Glenair, Inc.*, 23 Cal. App. 5th 262, 277  
 2 (2018), *as modified on denial of reh'g* (May 14, 2018) (“An agent ... is anyone who undertakes to  
 3 transact some business, or manage some affair, for another, by authority of and on account of the  
 4 latter, and to render an account of those transactions.”) (citation omitted), *disapproved of on other*  
 5 *grounds by Grande v. Eisenhower Med. Ctr.*, 13 Cal. 5th 313 (2022).

6 Rearden’s proposed instruction on agency should be rejected. Although Rearden’s proposal  
 7 accurately states that “[a]n employee is an agent of their employer for matters within the scope of  
 8 their employment” the remainder of the instruction is improper. The first paragraph of Rearden’s  
 9 proposed instruction lays out Rearden’s theory of the case in unnecessary detail. Further, Rearden’s  
 10 statement that “Disney denies that LaSalle was an employee of Rearden when he formed MO2, LLC,  
 11 or that LaSalle was Rearden’s agent for purposes of forming MO2, LLC” does not accurately reflect  
 12 Defendant’s position, which is that even if Mr. LaSalle was employed by Rearden at the time, he was  
 13 not acting within the scope of his agency as a Rearden employee.

14 The second paragraph of Rearden’s proposed instruction includes irrelevant instructions  
 15 relating to *breach of duty* rather than the *scope of agency*. Unlike the cases Rearden cites to support  
 16 its special instruction, this case does not involve any claim by Rearden against Greg LaSalle for  
 17 breaching any alleged duties. There is no reason to instruct the jury on the kinds of duties owed by  
 18 an employee or how those may be breached, because those issues are not relevant to any issue the  
 19 jury will have to decide.

20 The duty of loyalty applies only to “matters connected with the agency relationship.” *E.g.*,  
 21 *Huong Que, Inc. v. Luu*, 150 Cal. App. 4th 400, 410-11 (2007) (stating as a separate element from  
 22 breach “the existence of a relationship giving rise to a duty of loyalty,” and explaining that an “agent  
 23 assumes ‘a fiduciary duty to act loyally for the principal’s benefit *in all matters connected with the*  
 24 *agency relationship*’”) (quoting Restatement (Third) Agency, § 8.01); Restatement (Third) of  
 25 Agency, § 8.01, comment (a) (It is a “basic principle that *when taking action within the scope of an*  
 26 *agency relationship*, an agent’s duty as a fiduciary is to act loyally for the principal’s benefit.”)  
 27 (emphasis added). If Mr. LaSalle was acting *outside* the scope of his agency to form MO2 and  
 28

1 acquire the MOVA assets, then there is no reason to reach the question of loyalty—Rearden would  
2 not own the MOVA assets by virtue of Mr. LaSalle’s agency. Similarly if Mr. LaSalle was acting  
3 *within* the scope of his agency, there would also be no reason to reach the question of loyalty—  
4 Rearden would own the MOVA assets by virtue of Mr. LaSalle’s agency. The issue of whether Mr.  
5 LaSalle breached a duty of loyalty to Rearden is simply irrelevant to question of ownership, and  
6 would be highly confusing to the jury. Rearden’s instruction incorrectly suggests to the jury that  
7 they could find that Mr. LaSalle acquired MO2 and the MOVA assets for Rearden’s benefit if Mr.  
8 LaSalle acted “disloyally.” Mr. LaSalle’s loyalties are irrelevant to the ownership question.

9 Rearden’s proposed agency instruction should also be rejected as untimely. *In re Arizona*,  
10 528 F.3d 652, 657 (9th Cir. 2008) (court has wide discretion to enforce its case management orders).  
11 Rearden did not propose any instruction on agency in the sets of instructions the parties exchanged  
12 on October 13, 2023, pursuant to the Court’s Case Management Order, ECF No. 313; it provided an  
13 agency instruction on October 20, 2023 minutes before the filing deadline; and it completely  
14 revamped that instruction in revised exchanges intended to address intervening Court orders on  
15 different topics.

**UNDISPUTED: 17.7 Copyright Infringement—Copyright Registration Certificate****(17 U.S.C. § 410(c))**

A copyright owner may obtain a certificate of registration from the Copyright Office.

~~*[When defendant does not present evidence regarding validity or ownership of copyright]*~~

~~The evidence in this case includes Exhibit \_\_, a certificate of copyright registration from the Copyright Office. You are instructed that the certificate is sufficient to establish that there is a valid copyright in *[identify the work in question]*.~~

~~*[When defendant presents evidence regarding validity or ownership of copyright]*~~

The evidence in this case includes Exhibit \_\_, a certificate of copyright registration from the Copyright Office. ~~*[If you find that this certificate was made within five years after This certificate was issued before first publication of the MOVA Contour software plaintiff's work, so you may consider this certificate is evidence of the facts stated in the certificate.]*~~ From this certificate you may, but need not, conclude that ~~*:- [state specifics of the certificate relevant to the case, e.g., that plaintiff's work is the original and copyrightable work of the author and that*~~ the plaintiff owns the copyright in that work~~],~~ which I explain in Instructions 17.5, 17.6, 17.12, and Special Instruction 2~~*[insert instruction numbers relevant to elements of plaintiff's burden]*~~.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).



**DISPUTED: 17.20 Secondary Liability—Vicarious Infringement—****Elements and Burden of Proof****1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

If you find that ~~[name of direct infringer]~~ Rearden owned the copyright in the MOVA Contour software at the time DD3 copied the MOVA Contour software and therefore that DD3 infringed the plaintiff's copyright in ~~[name of allegedly infringed work]~~, the MOVA Contour software, you next must determine whether ~~[name of alleged vicarious infringer]~~ Disney is vicariously ~~infringed that or contributorily~~ liable for DD3's copyright. ~~The plaintiff infringement.~~

I will now instruct you on the elements and burden of proof on Rearden's claim that Disney is vicariously liable for DD3's copyright infringement. ~~My instruction on contributory infringement is at instruction 17.21.~~

For its claim of vicarious liability, Rearden has the burden of proving each of the following elements by a preponderance of the evidence:

1. ~~the defendant~~ Disney directly benefitted financially from the infringing activity of ~~[name of direct infringer]~~; DD3;
2. ~~the defendant~~ Disney had the right and ability to ~~[supervise]~~ ~~[or control]~~ the infringing activity of ~~[name of direct infringer]~~; DD3; and
- ~~[3. the defendant~~ Disney failed to exercise that right and ability.].

If you find that ~~the plaintiff~~ Rearden has proved each of these elements, your verdict should be for ~~the plaintiff~~ Rearden if you also find that ~~[name of direct infringer]~~ DD3 infringed plaintiff's copyright. If, on the other hand, ~~the plaintiff~~ Rearden has failed to prove any of these elements, your verdict should be for the defendant ~~[name of alleged vicarious infringer]~~, Disney.

**AUTHORITY:** Ninth Circuit Model Jury Instruction 17.20 (unaltered except to identify the alleged direct and vicarious infringers, select appropriate bracketed text, and conform the instruction to the facts and issues in the case).

**B. DEFENDANT’S PROPOSED INSTRUCTION:**

If you find that ~~[name of direct infringer]~~ Rearden owned the copyright in the MOVA Contour software at the time DD3 copied code from the MOVA Contour software and therefore that DD3 infringed the plaintiff’s copyright in ~~[name of allegedly infringed work]~~, the MOVA Contour software, you next must determine whether ~~[name of alleged vicarious infringer]~~ Disney is vicariously ~~infringed that~~ liable for DD3’s copyright. ~~The plaintiff infringement.~~

I will now instruct you on the elements and burden of proof on Rearden’s claim that Disney is vicariously liable for DD3’s copyright infringement.

For its claim of vicarious liability, Rearden has the burden of proving each of the following elements by a preponderance of the evidence:

1. ~~the defendant~~ Disney directly benefitted financially from the infringing activity of ~~[name of direct infringer]~~; DD3;
2. ~~the defendant~~ Disney had the legal right and practical ability to ~~[supervise]~~ ~~[or control]~~ the infringing activity of ~~[name of direct infringer]~~; DD3; and
- ~~[3. the defendant~~ Disney failed to exercise that right and ability-].

If you find that ~~the plaintiff~~ Rearden has proved each of these elements, your verdict should be for ~~the plaintiff~~ Rearden if you also find that ~~[name of direct infringer]~~ DD3 infringed plaintiff’s copyright. If, on the other hand, ~~the plaintiff~~ Rearden has failed to prove any of these elements, your verdict should be for the defendant ~~[name of alleged vicarious infringer]~~, Disney.

**AUTHORITY:** Ninth Circuit Model Civil Jury Instructions, Comment to 17.20; *Williams v. Gaye*, 895 F.3d 1106, 1132 (9th Cir. 2018); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007); Order on Motion for Summary Judgment (Dkt. 555).

## 2. PARTIES' POSITION STATEMENTS

### A. PLAINTIFFS' POSITION

Rearden disputes Disney's proposed departure from the Model Instruction and expansion of the elements of a vicarious infringement. Model Instruction 17.20 states in relevant part that to prevail on a claim for vicarious infringement, the plaintiff must prove that the defendant "had the right and ability to supervise [or] control the infringing activity." Disney's proposed instruction alters that language to impose a requirement that Rearden prove the "legal right" and "practical ability" to control the infringing conduct. Disney's additional language is objectionable on several grounds.

First, Disney's proposed alteration to the Model Instruction invites the jury to invade the province of the Court in deciding what constitutes a "legal right" to supervise or control the infringing activity. Notably, neither this nor any other instruction informs the jury what constitutes such a "legal right" or when such a right might apply. It is not even clear from the instruction whether such a legal right arises from a statute, the common law, or contract (and if the right is contractual, Disney does not provide any instructions regarding contract formation or interpretation). Disney's instruction invites the jury to decide what the law is and decide on its own whether such a "legal right" exists – a clear breach of the division of responsibilities between the Court and the jury. "It is the duty of the court to instruct the jury as to the law and it is the duty of the jury to follow the law as it is laid down by the court." *Sparf v. United States*, 156 U.S. 51, 74, (1895) (Harlan, J.) (quoting *United States v. Battiste*, 24 F. Cas. 1042, 1043 (Story, Circuit Justice, C.C.D. Mass. 1835)).

Second, Disney's additional language, taken from the *comments* to the model instruction, referring to the "practical" ability is misleading and based upon inapplicable case law here. The comment to Model Instruction 17.20, in discussing the "ability to control" element of vicarious infringement, states that "*In certain cases*, it may be appropriate to instruct the jury on the meaning of "right and ability to supervise or control" the infringing activity. That language necessarily means that the model instruction may be modified under "appropriate" circumstances in *some* but not *all* cases. The comment then refers to two cases where modification may be appropriate: *Perfect 10*,

1 *Inc. v. Visa Int’l Serv. Ass’n*, 494 F.3d 788, 805 (9th Cir. 2007), and *VHT, Inc. v. Zillow Grp., Inc.*,  
 2 918 F.3d 723, 745 (9th Cir. 2019). Neither of these cases supports the alteration of the Model  
 3 Instruction in this case.

4 In *Perfect 10*, the plaintiff alleged that “numerous websites based in several countries have  
 5 stolen its proprietary images, altered them, and illegally offered them for sale online.” *Id.* at 793. The  
 6 issue was whether credit card companies had the “right and ability” to control this infringing content  
 7 on the ground that their “rules and regulations permit them to require member merchants to cease  
 8 illegal activity – presumably including copyright infringement – as a condition to their continuing  
 9 right to receive credit card payments . . . .” *Id.*, at 804. The court found it did not because the “ability  
 10 to exert financial pressure does not give Defendants the right or ability to control the actual  
 11 infringing activity . . . they cannot stop websites from reproducing, altering, or distributing  
 12 infringing images.” *Id.* at 804-05.

13 *VHT* similarly involved allegations that Zillow vicariously infringed copyrighted material that  
 14 were uploaded to its platform from third party websites. *VHT*, 918 F.3d at 746. The court found it  
 15 had not because “there was insufficient evidence that Zillow had the technical ability to screen out or  
 16 identify infringing VHT photos among the many photos that users saved or uploaded daily . . . .” *Id.*  
 17 “Zillow’s failure to change its operations to avoid assisting users to distribute infringing content is  
 18 not the same as declining to exercise a right and ability to make third parties stop their direct  
 19 infringement.” *Id.* (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1175 (internal  
 20 quotation marks and alterations omitted). *Perfect 10, VHT*, and the cases they rely upon (including  
 21 *Perfect 10 v. Amazon*) have a common thread: they involve allegations of vicarious infringement  
 22 based on the use of third-party internet content on websites, where the relationship between the  
 23 defendant and the infringer was indirect and unrelated to the infringing conduct. That is not the case  
 24 here, where Disney specifically retained DD3 to create the content for its own use and distribution,  
 25 and its representatives personally controlled and supervised the infringing activity. That relationship,  
 26 unlike those at issue in *Perfect 10* and *VHT*, is both direct and directly related to the infringing  
 27  
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1 conduct. As such, the “practical ability” language has no application to the facts of this case, and  
2 should not be adopted.

3 The parties also dispute whether, as with other instructions, the first paragraph of the  
4 instruction should refer to the infringement as DD3 “copied the MOVA Contour software,” or  
5 “copied code from the MOVA Contour software.” Rearden will not repeat its arguments here, but  
6 refers back to its position statement regarding Disputed Instruction 1.5 in the Preliminary  
7 Instructions.

### 8 9 **B. DEFENDANT’S POSITION**

10 Defendant proposes the addition of “legal” before “right” and “practical” before “ability” in  
11 the second element, consistent with Ninth Circuit case law and this Court’s Order on Defendant’s  
12 motion for summary judgment, all of which contain this exact language. *See Williams v. Gaye*, 895  
13 F.3d 1106, 1132 (9th Cir. 2018) (“A vicarious infringer ‘exercises control over a direct infringer  
14 when he has both a *legal right* to stop or limit the directly infringing conduct, as well as the *practical*  
15 *ability* to do so.’”) (emphasis added) (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,  
16 1173 (9th Cir. 2007); Dkt. 555 at 9 (Court’s summary judgment Order quoting the same language  
17 from *Williams* and holding that “there is a genuine issue of material fact as to whether Disney had  
18 the *practical* ability to stop or limit the infringing conduct ...”) (emphasis added). The Court should  
19 adopt Defendant’s proposal because it is the correct statement of the legal standard and will help the  
20 jury understand their charge. Where, as here, the model instruction “does not accurately track” the  
21 controlling law, the Court should conform the model to the governing legal standard. *Blumenthal*  
22 *Distrib., Inc. v. Herman Miller, Inc.*, 963 F.3d 859, 869 (9th Cir. 2020) (“[B]ecause th[e] instruction  
23 [given by the district court and derived from the Ninth Circuit Model] does not accurately track our  
24 functionality caselaw, its use was error and we must reverse.”) (citation omitted). The Comment to  
25 Model Instruction 17.20 specifically contemplates that in “certain cases, it may be appropriate to  
26 instruct the jury on the meaning of ‘right and ability to supervise or control.’” Ninth Circuit Manual  
27 of Model Civil Jury Instructions at 445. It would be appropriate to do so here, as without some  
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1 further explication, a lay jury unfamiliar with the application of the legal standard is likely to be  
2 confused.

3 Defendant's proposal is a modest, two-word adjustment to the model instruction to achieve  
4 the exact purpose contemplated by the Ninth Circuit's comment and to ensure the instructions are  
5 consistent with the case law that the Court and all of the parties have applied to this case. Using the  
6 same words the Ninth Circuit did—"legal" and "practical"—clarifies what for lay jurors are not self-  
7 evident concepts. Modifying "right" with "legal" makes it clear to jurors that the defendant must  
8 have legal authority to take action, not a moral or amorphous right to do so. Likewise, modifying  
9 "ability" with "practical" makes it clear that the defendant must have the realistic, and not simply the  
10 theoretical, ability to supervise or control the infringement. The latter clarification is critical in this  
11 case. The Court's summary judgment ruling concluded that a jury could, not that it must, find that  
12 the contract with DD3 gave Defendant the ability to stop DD3's use of MOVA. The ruling finds it is  
13 a jury question whether Defendant had the *practical* ability to stop that use, in light of facts showing  
14 the difficulty of detecting the alleged infringement and policing hundreds of vendors and  
15 technologies that Defendant used to make a major motion picture.

16 Not only did the Court and Defendant cite and apply this standard in the summary judgment  
17 Order and motion respectively, but Plaintiffs also did the same. *See, e.g.*, Dkt. 555 at 9-12 (Court's  
18 summary judgment order); Dkt. 451 at 9-17 (Plaintiffs' summary judgment opposition); Dkt. 421 at  
19 11-17 (Defendant's motion for summary judgment). Plaintiffs quoted the exact same language from  
20 *Williams* that the Court applied in its summary judgment Order and that Defendant proposes to add  
21 to the model instruction here. *See* Dkt. 451 at 9.

22 At the parties' most recent meet and confer conference, however, Plaintiffs reversed course  
23 and claimed that the very standard they quoted in their summary judgment briefing did not actually  
24 apply here. In particular, Plaintiffs claimed that the question of whether a defendant has the  
25 "practical ability" to control the infringement applies only in the online context, where technical  
26 constraints supposedly make it uniquely difficult to detect infringement. There is no authority for  
27 Plaintiffs' new position. No case that Defendant has seen states that only certain technical Internet  
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cases are subject to the “practical ability” standard. To the contrary, *Williams*—the Ninth Circuit case on vicarious infringement that the Court cited in its summary judgment ruling—discusses the “practical ability” to control the infringement, but it is not a case involving online infringement or highly technical details; it was a standard copyright infringement case based on the music composition copyright in the song *Got to Give It Up*. The same is true of the *scores* of other cases that have stated the applicable standard as “legal right” and “practical ability” and that do not involve infringement in the online context. *See, e.g., Range Road Music, Inc. v. East Coast Foods, Inc.*, 668 F.3d 1148, 1155 (9th Cir. 2012) (public performance of infringing musical works at restaurant and lounge); *Liguori v. Hansen*, 752 F. App’x 389, 392 (9th Cir. 2018) (infringing logo on souvenir book); *Leonard v. Stemtech Int’l Inc.*, 834 F.3d 376, 389 (3d Cir. 2016) (copyrighted photos infringing reproduced, publicly displayed, and distributed on magazines, merchandise, motion pictures, and other locations); *Kevin Barry Fine Art Assocs. v. Ken Gangbar Studio, Inc.*, 391 F. Supp. 3d 959, 968-69 (N.D. Cal. 2019) (reproduction of infringing sculptural works for use in restaurant); *Oregon Catholic Press v. Ambrosetti*, 218 F. Supp. 3d 1158, 1165 (D. Or. 2016) (reproduction and distribution of musical works in church hymnals); *Adobe Sys. Inc. v. Canus Prods., Inc.*, 173 F. Supp. 2d 1044, 1053-55 (C.D. Cal. 2001) (sale of infringing software at computer fairs); *Rams v. Def Jam Recordings, Inc.*, 202 F. Supp. 3d 376, 385 (S.D.N.Y. 2016) (copyrighted image used as infringing album cover art); *Payne v. Manilow*, 2019 WL 4149357, at \*2 (C.D. Cal. July 11, 2019) (infringing public displays at concerts and award shows of copyrighted motion picture); *Kilina Am., Inc. v. Bonded Apparel, Inc.*, 2019 WL 8065854, at \*2 (Nov. 19, 2019) (alleged infringement of fabric design); *Broad. Music, Inc. v. Five Star Enters., LLC*, 2018 WL 4492481, at \*3 (D. Nev. Sept. 19, 2018) (infringing public performances of copyrighted music at restaurant).

The requirement that the defendant must have the “practical ability” to control the infringement is not limited to the online context—it is a fundamental element of vicarious liability that applies in every case. *See, e.g., Paramount Pictures Corp. v. Int’l Media Films Inc.*, 2013 WL 3215189, at \*14 (C.D. Cal. June 12, 2013) (holding in case involving infringing distribution of



1 motion picture that “[t]he test for right or ability to supervise infringing requires both ‘a legal right to  
2 stop or limit the directly infringing conduct ... [and] the practical ability to do so.’”) (internal  
3 alterations in original) (citation omitted); *Kevin Barry Fine Art Assocs.*, 391 F. Supp. 3d at 968-69  
4 (“As to vicarious liability, one is liable ‘[1] by profiting from direct infringement while [2] declining  
5 to exercise a right to stop or limit it.’ [citations] The second prong, which the Ninth Circuit refers to  
6 as the ‘control’ element, requires that the defendant ‘ha[d] both a legal right to stop or limit the  
7 directly infringing conduct, as well as the practical ability to do so.’”) (citations omitted); *Kilina Am.,  
8 Inc. v. SA & PW, Inc.*, 2019 WL 8685066, at \*2 (C.D. Cal. Aug. 27, 2019) (“Any pressure that  
9 [alleged vicarious infringer] could feasibly put on [direct infringer] falls far short of the “legal right”  
10 and “practical ability” to control necessary to impose vicarious liability.”).

11 It is critical for the jury to understand that a copyright defendant’s liability for someone else’s  
12 conduct cannot be imposed just because in some remote or theoretical but completely impractical  
13 sense the defendant may have the ability to control the infringement. *See, e.g., Millennium Funding,  
14 Inc. v. 1701 Mgmt. LLC*, 576 F.Supp.3d 1192, 1215 (S.D. Fla. 2021) (“[T]he plaintiff must allege  
15 that the defendant has a ‘practical ability to police the infringing activities of [third parties] as  
16 opposed to suggesting measures that are imprecise, overbroad or not workable.’”) (citation omitted);  
17 *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1174 (9th Cir. 2007) (similar). The  
18 concept of vicarious liability is not that expansive. As case after case has affirmed, the standard  
19 requires that the defendant have the *practical* ability to actually do something about the  
20 infringement. The jury should be so instructed.

21 In the parties’ most recent meet and confer, Plaintiffs also claimed that adding the word  
22 “legal” before “right” would confuse the jury and lead them to believe that they are being asked to  
23 draw a legal conclusion. That does not make sense. As discussed, “legal right” will help the jury  
24 understand that they must do more than evaluate whether this is morally “right” or just.

25 Because Defendant’s proposal accurately reflects current Ninth Circuit law and will assist the  
26 jury with understanding the standard, the Court should adopt Defendant’s proposal.



**DISPUTED: 17.32 Copyright—Damages (17 U.S.C. § 504)****1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

If you find for ~~the plaintiff~~ Rearden on ~~the plaintiff's~~ sits copyright infringement claim, you must determine ~~the plaintiff's~~ Rearden's damages. ~~The plaintiff, if any.~~ Rearden is entitled to recover ~~the any~~ actual damages suffered as a result of the infringement. In addition, ~~the plaintiff~~ Rearden is also entitled to recover any profits of the defendant attributable to the infringement. ~~The plaintiff must prove damages by a preponderance of the evidence. I will instruct you on the burdens that each party has on the elements of this issue.~~

**AUTHORITY:** 17 U.S.C. § 504(b); Ninth Circuit Model Civil Jury Instructions, Comment to 17.32 (altered to conform the instruction to the facts and issues in the case).

**B. DEFENDANT'S PROPOSED INSTRUCTION:**

If you find for ~~the plaintiff~~ Rearden on ~~the plaintiff's~~ sits copyright infringement claim, you must determine ~~the plaintiff's~~ Rearden's damages, if any. ~~The plaintiff is entitled to recover the actual damages suffered as a result of the infringement. In addition, the plaintiff.~~ Rearden is also entitled to recover any profits of the defendant attributable to the infringement. I will instruct you on the burdens that each party has on the elements of this issue. ~~The plaintiff that are not taken into account in computing actual damages. Rearden must prove damages by a preponderance of the evidence.~~

**AUTHORITY:** 17 U.S.C. § 504(b); Ninth Circuit Model Civil Jury Instructions, Comment to 17.32.

1 **2. PARTIES' POSITION STATEMENTS**

2 **A. PLAINTIFFS' POSITION**

3 Whether Instruction 17.32 should be given depends on the Court's rulings on the Plaintiffs'  
4 Motion for Reconsideration and Disney's Motion to Strike Jury Trial. Rearden has (or will) fully  
5 state its arguments with respect to those issues in the briefing, and Rearden will not repeat that  
6 analysis here, but instead will refer the Court to those substantive briefs. *See* Plaintiffs' Motion for  
7 Reconsideration of Order Granting Defendants' Motion to Exclude Testimony of Cindy Ievers and  
8 Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment (ECF No.  
9 585) and Plaintiffs' Opposition to Defendant's Motion to Strike Plaintiffs' Jury Demand for a Jury  
10 Trial on Disgorgement of Profits (ECF No. 589).

11 If the Court grants Rearden's motion for reconsideration, denies Disney's motion to strike the  
12 jury trial on infringer profit damages, or does both of those things, this instruction should be given  
13 (with appropriate alterations to conform the instruction to the damage theories being submitted to the  
14 jury as necessary). If the Court both denies Plaintiffs' motion and grants Disney's such that no  
15 damage issue will be decided by the jury, Rearden concedes that this instruction would be  
16 unnecessary.

17 Disney has submitted its own version of this instruction in the alternative. The two  
18 instructions are identical with the exception that Rearden's includes the portion of the instruction  
19 relating to actual damages, which is the subject of Rearden's motion for reconsideration.

20  
21 **B. DEFENDANT'S POSITION**

22 Defendant proposes this instruction only in the alternative, if the Court does not grant its Motion to  
23 Strike Rearden's jury demand on its claim for disgorgement of profits (Dkt. 579). *See, e.g., U.S. v.*  
24 *Laurienti*, 611 F.3d 530, 544 (9th Cir. 2010) ("[N]othing prevents a party from arguing in the  
25 alternative" and indicating the party "could have proposed an instruction along the lines of the legal  
26 theory they proposed ... and, at the same time, argued that, if the court rejected [the party's] theory,  
27 the court should accept the [other party's] proposed instruction."). If the Court grants Defendant's  
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1 Motion to Strike, then no instructions on damages should be submitted to the jury. Defendant offers  
2 the instruction in the alternative in the event the Court denies Defendant's Motion to Strike.

3 If the Court puts the issue of disgorgement of profits to the jury, Defendant's proposed  
4 instruction should be used. Defendant's modifications to the model instruction reflect that actual  
5 damages are no longer in the case after the Court's summary judgment and *Daubert* order dismissed  
6 Plaintiffs' claim for actual damages. Defendant's modification also correctly instructs the jury that a  
7 subsequent instruction (17.34) will provide the applicable burdens of proof.

**DISPUTED: SPECIAL INSTRUCTION 3 – DAMAGES**

**1. DISPUTED PROPOSED INSTRUCTIONS**

**A. PLAINTIFFS’ PROPOSED INSTRUCTION:**

NONE

**B. DEFENDANT’S PROPOSED INSTRUCTION:**

The damages Rearden seeks are designed solely to prevent the defendant’s unjust enrichment. In determining Rearden’s damages, if any, you may not consider any punitive or deterrent purposes. You also may not consider the defendant’s ability to pay.

**AUTHORITY:** 17 U.S.C. § 504(b), (c); Ninth Circuit Model Civil Jury Instructions, Comment to 17.32; *Nintendo of Am., Inc. v. Dragon Pac. Int’l*, 40 F.3d 1007, 1011 (9th Cir. 1994); *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-CV-01393-JST, 2022 WL 20403763, at \*3 (N.D. Cal. May 3, 2022).

**2. PARTIES’ POSITION STATEMENTS**

**A. PLAINTIFFS’ POSITION**

Plaintiffs dispute this instruction, offered by Disney in the alternative, as unnecessary and inaccurate. The sentence “[t]he damages Rearden seeks are designed solely to compensate Rearden and to prevent the defendant’s unjust enrichment” is incomplete and therefore inaccurate. The 9<sup>th</sup> Circuit has long recognized that profit damages are not only intended to compensate and prevent unjust enrichment, but also to deter infringing conduct. *See Kamar Int’l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1332 (9th Cir. 1984) (“An award of infringer’s profits is aimed in part at deterring infringements, *see, e.g., Russell*, 612 F.2d 1132, and in part at appropriately compensating the copyright holder.”); *Nintendo of Am., Inc. v. Dragon Pac. Int’l*, 40 F.3d 1007, 1011 (9th Cir. 1994) (“‘Profits are awarded [under the Lanham Act] under different rationales including unjust enrichment, deterrence, and compensation.’” (quoting *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 941

(7th Cir.1989), *cert. denied*, 493 U.S. 1075, (1990)); *Maier Brewing Co. v. Fleischmann Distilling Corp.*, 390 F.2d 117, 123 (9th Cir. 1968) (“In those cases where there is infringement, but no direct competition, this can be accomplished by the use of an accounting of profits based on unjust enrichment rationale. Such an approach to the granting of accountings of profits would, by removing the motive for infringements, have the effect of deterring future infringements.”). As these cases make clear, profit damages are not “designed solely” to compensate and prevent unjust enrichment – they are also designed to deter future infringements.

Plaintiffs do not disagree that the jury need not consider the deterrent effect of its damage award (because the deterrent effect results from the jury’s fair application of the standards for awarding profit damages and not from an intent to deter), but it is inappropriate to misinform the jury about the intended purposes of allowing profit damages for copyright infringement. Moreover, the instruction in the second sentence to “not consider any punitive or deterrent purposes” becomes necessary (assuming for purposes of discussion that it is necessary) only because the first sentence opens to the door to the potential for the jury to assess damages for punitive or deterrent purposes. Plaintiffs will not argue that the jury should make its apportionment of profits based on retribution or deterrence. The instruction is unnecessary and improper and should be refused.

## **B. DEFENDANT’S POSITION**

Defendant proposes this instruction only in the alternative, if the Court does not grant its Motion to Strike Rearden’s jury demand on its claim for disgorgement of profits (Dkt. 579). *See, e.g., U.S. v. Laurienti*, 611 F.3d 530, 544 (9th Cir. 2010) (“[N]othing prevents a party from arguing in the alternative” and indicating the party “could have proposed an instruction along the lines of the legal theory they proposed ... and, at the same time, argued that, if the court rejected [the party’s] theory, the court should accept the [other party’s] proposed instruction.”). If the Court grants Defendant’s Motion to Strike, then no instructions on damages should be submitted to the jury. Defendant offers the instruction in the alternative in the event the Court denies Defendant’s Motion to Strike.

1 If the Court submits the disgorgement of profits issue to the jury, Defendant’s proposed  
 2 special instruction is necessary to prevent legal error. This guidance comes from the governing  
 3 statute, 17 U.S.C. § 504, the Comment to 17.32 in the Ninth Circuit’s Manual for Model Civil Jury  
 4 Instructions, and case law. As explained in the Comment and the case it cites, *Nintendo of America,*  
 5 *Inc. v. Dragon Pacific International*, 40 F.3d 1007, 1010-11 (9th Cir. 1994), damages under Section  
 6 504(b) and statutory damages under Section 504(c) are mutually exclusive remedies. Statutory  
 7 damages under Section 504(c) can serve “punitive and deterrent purposes.” *Nintendo*, 40 F.3d at  
 8 1010-11. Profits under Section 504(b), by contrast, “are designed ... to prevent the defendant’s  
 9 unjust enrichment.” *Id.*; *see also Navarro v. Procter & Gamble Co.*, 529 F. Supp. 3d 742, 754 (S.D.  
 10 Ohio 2021) (“Disgorgement does not sound in compensating the plaintiff, but rather in ensuring that  
 11 the defendant does not unjustly profit, and thus disgorgement is not tied to ‘actual damages.’”); *Fair*  
 12 *Issac Corp. v. Fed. Ins. Co.*, 468 F. Supp. 3d 1110, 1116 (D. Minn. 2020) (“There is no sound basis  
 13 to conclude that ... disgorgement is a legal remedy that serves to punish and deter”; “[p]rofits are  
 14 awarded as damages to prevent infringers from reaping a wrongful benefit, *not* to prevent the  
 15 infringement.”). The congressional history behind Section 504(b) makes clear that actual damages  
 16 “are awarded to compensate the copyright owner for losses from the infringement, and profits are  
 17 awarded to prevent the infringer from unfairly benefiting from a wrongful act.” H.R. Rep. No. 94-  
 18 1476, at 161 (1976); *see also* 5 Nimmer on Copyright § 14.03. Plaintiffs may only seek damages  
 19 under Section 504(b); they are ineligible to seek statutory damages pursuant to Section 412 of the  
 20 Copyright Act, because Plaintiffs did not register the copyright before the alleged infringement  
 21 commenced. It would be legal error for the jury to determine damages based on factors that are  
 22 relevant only to Section 504(c) damages.

23 Further, punitive damages are not an available remedy, and therefore Defendant’s ability to  
 24 pay is irrelevant. *See Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-CV-01393-JST, 2022  
 25 WL 20403763, at \*3 (N.D. Cal. May 3, 2022) (granting motion *in limine* to preclude evidence of  
 26 party’s net worth, total net revenues, and total gross profits for liability and “compensatory damages  
 27 phase of the trial”). Plaintiffs put Defendant’s ability to pay at issue by having their damages expert,  
 28

1 Philip Fier, testify at deposition that the damages Plaintiffs seek in this case are not “a lot” of money  
2 for a “giant corporation” like Defendant, which could lead the jury to consider this improper factor in  
3 setting damages. *See* Fier Dep. 143:24-144:23. Even if Plaintiffs do not elicit similar testimony at  
4 trial, the jury will be well aware that Defendant is a very large corporation. To avoid the risk that  
5 that jury will rely on this impermissible factor, Defendant respectfully submits the Court should give  
6 this special instruction.

7 Plaintiffs do not agree with the first two sentences of the proposed instruction. Plaintiffs  
8 assert that deterrence is a purpose of a disgorgement remedy. But the cases Plaintiffs have cited to  
9 Defendant are inapposite. First, Plaintiffs cited cases concerning *trademark* damages, which are  
10 different from copyright and under an entirely different statutory regime. Plaintiffs quote language  
11 from *Nintendo* that specifically refers to “the Lanham Act,” which governs trademark claims. 40  
12 F.3d at 1011 (“Profits are awarded [under the Lanham Act] under different rationales including  
13 unjust enrichment, deterrence, and compensation.”) (alteration in original). *Maier Brewing Co. v.*  
14 *Fleischmann Distilling Corp.*, 390 F.2d 117, 123 (9th Cir. 1968), on which Plaintiffs also rely, only  
15 addresses trademark damages under the Lanham Act. Plaintiffs also rely on a case under the 1909  
16 Copyright Act, which had a different damages framework and which does not apply here, *see Kamar*  
17 *Int’l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1329 (9th Cir. 1984) (“The Copyright Act of 1909 ...  
18 governs this case”).  
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**DISPUTED: 17.33 Copyright—Damages—Actual Damages**

(17 U.S.C. § 504(b))

**1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS' PROPOSED INSTRUCTION:**

The copyright owner is entitled to recover ~~the~~ any actual damages suffered as a result of the infringement. Actual damages mean the amount of money adequate to compensate the copyright owner for the reduction of the fair market value of the copyrighted work caused by the infringement. The reduction of the fair market value of the copyrighted work is the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by the defendant of the plaintiff's work. ~~That amount could also be represented by the lost license fees the plaintiff would have received for the defendant's unauthorized use of the plaintiff's work.~~

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023) (altered for clarity and to conform to the facts of the case).

**B. DEFENDANT'S PROPOSED INSTRUCTION:**

The copyright owner is entitled to recover ~~the~~any actual damages suffered as a result of the infringement. Actual damages mean the amount of money adequate to compensate the copyright owner for the reduction of the fair market value of the copyrighted work caused by the infringement. The reduction of the fair market value of the copyrighted work is the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by the defendant of the plaintiff's work. That amount also could be represented by the lost license fees the plaintiff would have received for the defendant's unauthorized use of the plaintiff's work.



**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

## **2. PARTIES' POSITION STATEMENTS**

### **A. PLAINTIFFS' POSITION**

Rearden submits this instruction because if the Court grants its Motion for Reconsideration (ECF No. 585) this instruction will be necessary. Plaintiffs will not restate their arguments in favor of reconsideration here, but respectfully refer the Court to its submissions on that issue.

If the Court grants Rearden's motion and this instruction is necessary, the parties' dispute relates only the last sentence of this instruction, referring to the use of license fees as a possible measure of actual damages. Rearden's proposal deletes that language because it does not fit the facts of the case and may confuse the jury. Rearden has never licensed its technology, and therefore no evidence will be presented suggesting that lost license fees may be used as a measure of damages. Thus, in this context, the last sentence is surplusage and may confuse the jury as to why such evidence was not presented.

### **B. DEFENDANT'S POSITION**

Defendant does not believe that any actual damages instruction should be provided in this case, pursuant to the Court's Order on summary judgment (Dkt. 555) and Order excluding the testimony of Cindy Ievers (Dkt. 553), as well as Defendant's briefing related to the same, including the concurrently filed opposition to Plaintiffs' motion for reconsideration. Defendant proposes this instruction only in the alternative, if the Court grants Plaintiffs' motion for reconsideration and holds that actual damages are at issue in the case. *See, e.g., U.S. v. Laurienti*, 611 F.3d 530, 544 (9th Cir. 2010) ("[N]othing prevents a party from arguing in the alternative" and indicating the party "could have proposed an instruction along the lines of the legal theory they proposed ... and, at the same time, argued that, if the court rejected [the party's] theory, the court should accept the [other party's] proposed instruction.").

1           If the Court grants Plaintiffs’ motion for reconsideration and provides an instruction on actual  
2 damages, it should use Defendant’s proposed instruction. Plaintiffs’ proposal deletes language in the  
3 model instruction that reflects the correct statement of the law and should not be adopted by the  
4 Court. Plaintiffs’ argument that the text is not at issue in this case because Rearden does not license  
5 its technologies to third parties misses the point. That is not the issue for this instruction, and is not  
6 how a jury would understand it. Instead, the text properly provides an example of what a willing  
7 buyer would have paid a willing seller (“lost license fees”). As the comment to the model instruction  
8 notes, this is based firmly in Ninth Circuit case law. Ninth Circuit Model Civil Jury Instructions,  
9 Comment to 17.33; *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004) (“[I]t  
10 is not improper for a jury to consider *either* a hypothetical lost license fee *or* the value of the  
11 infringing use to the infringer to determine actual damages, provided the amount is not based on  
12 ‘undue speculation.’” (emphasis added) (quoting *McRoberts Software, Inc. v. Media 100, Inc.*, 329  
13 F.3d 557, 566 (7th Cir. 2003); *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) (“market value  
14 approach is an objective, not a subjective, analysis”)).

**DISPUTED: 17.34 Copyright—Damages—Defendant’s Profits**

(17 U.S.C. § 504(b))

**1. DISPUTED PROPOSED INSTRUCTIONS****A. PLAINTIFFS’ PROPOSED INSTRUCTION:**

~~In addition to actual damages, the~~ The copyright owner is entitled to any profits of the defendant attributable to the infringement. ~~You may not include in an award of profits any amount that you took into account in determining actual damages.~~

You may make an award of the defendant’s profits only if you find that the plaintiff showed a causal ~~[relationship]~~ ~~[nexus]~~ between the infringement and the ~~[profits generated indirectly from the infringement]~~ ~~[defendant’s gross revenue]~~.

The defendant’s profit is determined by ~~[deducting]~~ ~~[subtracting]~~ all expenses from the defendant’s gross revenue.

The defendant’s gross revenue is all of the defendant’s receipts ~~from the~~ ~~[use]~~ ~~[sale]~~ generated as a result of a ~~[product]~~ ~~[work]~~ ~~[containing or using the copyrighted work]~~ ~~[associated with the infringement]~~. The plaintiff has the burden of proving the defendant’s gross revenue by a preponderance of the evidence.

Expenses are all ~~[operating costs]~~ ~~[overhead costs]~~ ~~[and]~~ production costs incurred in producing the defendant’s gross revenue. The defendant has the burden of proving the defendant’s expenses by a preponderance of the evidence.

Unless you find that a portion of the profit ~~from~~ generated as a result of the ~~[use]~~ ~~[sale]~~ ~~of a~~ ~~[product]~~ ~~[work]~~ ~~containing or using the copyrighted work~~ infringement is attributable to factors other than use of the copyrighted work, all of the profit is to be attributed to the infringement. The defendant has the burden of proving the ~~[portion]~~ ~~[percentage]~~ of the profit, if any, attributable to factors other than ~~[copying]~~ ~~[infringing]~~ the copyrighted work.

**AUTHORITY:** Ninth Circuit Model Civil Jury Instructions, Comment to 17.34 (altered for clarity and to conform to the facts and issues in the case).

**B. DEFENDANT'S PROPOSED INSTRUCTION:**

~~In addition to actual damages, t~~The copyright owner is entitled to any profits of the defendant attributable to the infringement. ~~You may not include in an award of profits any amount that you took into account in determining actual damages.~~

You may make an award of the defendant's profits only if you find that the plaintiff showed a causal ~~[relationship]~~~~[nexus]~~ between the infringement and the ~~[profits generated indirectly from the infringement]~~~~[defendant's gross revenue]~~.

The defendant's profit is determined by ~~[deducting]~~~~[subtracting]~~ all expenses from the defendant's gross revenue.

The defendant's gross revenue is all of the defendant's receipts ~~from the [use]~~ ~~[sale]~~generated as a result of a ~~[[product] [work]]~~ ~~[[containing or using the copyrighted work]~~ ~~[associated with the infringement]]~~. The plaintiff has the burden of proving the defendant's gross revenue by a preponderance of the evidence.

Expenses are all ~~[operating costs]~~~~[overhead costs]~~~~[and]~~ production costs incurred in producing the defendant's gross revenue. The defendant has the burden of proving the defendant's expenses by a preponderance of the evidence.

Unless you find that a portion of the profit ~~from~~generated as a result of the ~~[use]~~~~[sale]~~ of a ~~[product] [work] containing or using the copyrighted work~~infringement is attributable to factors other than use of the copyrighted work, all of the profit is to be attributed to the infringement. The defendant has the burden of proving the ~~[portion]~~~~[percentage]~~ of the profit, if any, attributable to factors other than ~~[copying]~~~~[infringing]~~ the copyrighted work.

**AUTHORITY:** Ninth Circuit Model Civil Jury Instructions, Comment to 17.34; *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 711 (9th Cir. 2004).

**2. PARTIES' POSITION STATEMENTS****A. PLAINTIFFS' POSITION**

As with Instruction 17.32, this instruction is disputed insofar as Disney now claims that the jury should not be instructed or permitted to award Rearden's infringer profit damages under the Copyright Act. *See* Defendant's Motion to Strike Plaintiffs' Jury Demand for a Jury Trial on Disgorgement of Profits (ECF No. 579). Rearden's arguments are thoroughly described in its opposition to that motion; rather than repeating those arguments here, Rearden respectfully refers the Court to that submission. Plaintiffs' Opposition to Defendant's Motion to Strike Plaintiffs' Jury Demand for a Jury Trial on Disgorgement of Profits (ECF No. 589).

**B. DEFENDANT'S POSITION**

Defendant proposes this instruction only in the alternative, if the Court does not grant its Motion to Strike Rearden's jury demand on its claim for disgorgement of profits (Dkt. 579). *See, e.g., U.S. v. Laurienti*, 611 F.3d 530, 544 (9th Cir. 2010) ("[N]othing prevents a party from arguing in the alternative" and indicating the party "could have proposed an instruction along the lines of the legal theory they proposed ... and, at the same time, argued that, if the court rejected [the party's] theory, the court should accept the [other party's] proposed instruction."). If the Court grants Defendant's Motion to Strike, then no instructions on damages should be submitted to the jury. Defendant offers the instruction in the alternative, in the event the Court denies Defendant's Motion to Strike.

If the Court puts the issue of disgorgement of profits to the jury, then both parties are in agreement on the proposed instruction.

**UNDISPUTED: 3.1 Duty to Deliberate**

Before you begin your deliberations, elect one member of the jury as your presiding juror. The presiding juror will preside over the deliberations and serve as the spokesperson for the jury in court.

You shall diligently strive to reach agreement with all of the other jurors if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to their views.

It is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not be unwilling to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right or change an honest belief about the weight and effect of the evidence simply to reach a verdict.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 3.2 Consideration of Evidence—Conduct of the Jury**

Because you must base your verdict only on the evidence received in the case and on these instructions, I remind you that you must not be exposed to any other information about the case or to the issues it involves. Except for discussing the case with your fellow jurors during your deliberations:

Do not communicate with anyone in any way and do not let anyone else communicate with you in any way about the merits of the case or anything to do with it. This includes discussing the case in person, in writing, by phone, tablet, computer, or any other means, via email, via text messaging, or any internet chat room, blog, website or application, including but not limited to Facebook, YouTube, Twitter, Instagram, LinkedIn, Snapchat, TikTok, or any other forms of social media. This applies to communicating with your family members, your employer, the media or press, and the people involved in the trial. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter and to report the contact to the court.

Do not read, watch, or listen to any news or media accounts or commentary about the case or anything to do with it ~~[, although I have no information that there will be news reports about this case];~~ do not do any research, such as consulting dictionaries, searching the Internet, or using other reference materials; and do not make any investigation or in any other way try to learn about the case on your own.

Do not visit or view any place discussed in this case, and do not use Internet programs or other devices to search for or view any place discussed during the trial. Also, do not do any research about this case, the law, or the people involved—including the parties, the witnesses, or the lawyers—until you have been excused as jurors. If you happen to read or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

1           These rules protect each party's right to have this case decided only on evidence that has been  
2 presented here in court. Witnesses here in court take an oath to tell the truth, and the accuracy of  
3 their testimony is tested through the trial process. If you do any research or investigation outside the  
4 courtroom, or gain any information through improper communications, then your verdict may be  
5 influenced by inaccurate, incomplete, or misleading information that has not been tested by the trial  
6 process. Each of the parties is entitled to a fair trial by an impartial jury, and if you decide the case  
7 based on information not presented in court, you will have denied the parties a fair trial. Remember,  
8 you have taken an oath to follow the rules, and it is very important that you follow these rules.

9           A juror who violates these restrictions jeopardizes the fairness of these proceedings<sup>15</sup>, and a  
10 mistrial could result that would require the entire trial process to start over<sup>16</sup>. If any juror is exposed  
11 to any outside information, please notify the court immediately.

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13 **AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May  
14 2023).



**UNDISPUTED: 3.3 Communication with Court**

If it becomes necessary during your deliberations to communicate with me, you may send a note through the ~~clerk~~ ~~bailiff~~, courtroom deputy, signed by any one or more of you. No member of the jury should ever attempt to communicate with me except by a signed writing. I will not communicate with any member of the jury on anything concerning the case except in writing or here in open court. If you send out a question, I will consult with the lawyers before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone—including the court—how the jury stands, whether in terms of vote count or otherwise, until after you have reached a unanimous verdict or have been discharged.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).

**UNDISPUTED: 3.5 Return of Verdict**

A verdict form has been prepared for you. ~~Explain verdict form as needed.~~ After you have reached unanimous agreement on a verdict, your ~~presiding juror~~ ~~foreperson~~ should complete the verdict form according to your deliberations, sign and date it, and advise the ~~clerk~~ ~~bailiff~~ courtroom deputy that you are ready to return to the courtroom.

**AUTHORITY:** Ninth Circuit Manual of Model Civil Jury Instructions (2017 Ed., updated May 2023).